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THE
OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XXIII.

BEING REPORTS OF CASES DECIDED
BY THE
SUPERIOR, COMMON PLEAS, PROBATE AND
INSOLVENCY COURTS OF THE
STATE OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
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Ohio Nisi Prius Reports

NEW SERIES—VOLUME XXIII.

Causes Argued and Determined in the Superior, Common Pleas,
Probate and Insolvency Courts of Ohio.

JURISDICTION OF AN OHIO MUNICIPALITY BELOW LOW WATER MARK OF THE OHIO RIVER.

Court of Common Pleas of Hamilton County.

FREDERICK DICKOW v. CITY OF CINCINNATI. (No. 171903.

C. G. BROOKS v. CITY OF CINCINNATI. No. 171904.

CHARLES G. BROOKS, PRESIDENT CONEY ISLAND COMPANY v.
CITY OF CINCINNATI. No. 172794.

Decided, June, 1920.

*Steamboat Lying at Municipal Wharf Below Low Water Mark in the
Ohio River—Subject to Municipal Smoke Abatement Ordinance—
Constitutionality of the Cincinnati Ordinance—Police Power and
Interstate Commerce—When Officers and Employees of a Corpora-
tion May be Held Criminally Liable for Creation of a Nuisance.*

1. A municipal ordinance prescribing a test for determining dense smoke, declaring that the emission or escape of smoke within the city of Cincinnati of a greater degree of darkness from any smoke stack of any boat, etc., to be a nuisance punishable by fine and imprisonment, is constitutional and valid.
2. A boat anchored in the Ohio river, opposite the Cincinnati shore, is within the municipal boundaries without regard to whether it

is above or below low water mark; and such a boat is therefore within the legislative, executive and judicial jurisdiction of the city of Cincinnati subject to the paramount jurisdiction of the federal government over admiralty and interstate commerce subjects and the concurrent jurisdiction of Kentucky.

3. The ordinance in question comes within the police power of the state, does not regulate interstate commerce and only affects it incidentally, does not conflict with the act of Congress regulating steam vessels, and is therefore operative over the waters of the Ohio river opposite the Cincinnati shore.
4. To hold the officers or employees of a corporation criminally liable for a nuisance created in the conduct of the corporate business, it must appear that the nuisance was created in the careful conduct of the business in the usual and customary way, or that the officer or agent knowing of the existence of the nuisance and having power to abate it, allowed it to continue.

Shaffer & Williams, for plaintiffs in error.

Chauncey D. Pichel, Asst. City Solicitor, for the city.

Robert S. Marx, orally on behalf of Smoke Abatement League and as *amicus curiae*.

Murray Seasingood and Robert P. Goldman, on brief for the Smoke Abatement League and *amici curiae*.

MATTHEWS, J.

The plaintiff in error, Frederick Dickow, was engineer on the steamer Island Queen, and the plaintiff in error, C. G. Brooks, was president of the Coney Island Company, a corporation that owned the Island Queen, a pleasure boat that was chiefly used in transporting passengers from the wharf-boat in the Ohio river at the foot of Broadway, Cincinnati, Ohio, to the landing owned by the Coney Island Company at its pleasure resort known as Coney Island, also in the city of Cincinnati, Ohio.

The plaintiff in error, Frederick Dickow, and C. G. Brooks, were charged by separate affidavit with having violated on June 26, 1919, an ordinance of the city of Cincinnati, prohibiting the creation of a nuisance by causing, or permitting, or suffering the emission or escape from the smoke stack of any boat, of smoke of a greater degree of darkness than No. 1 scale, as that term was defined to mean in the ordinance, for a period in excess

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of the time permitted by the ordinance. See Sections 309, 310, 311 of the code of ordinances of the city of Cincinnati. In the affidavits the specific charge was that they caused, permitted, or suffered the emission or escape of said smoke from a certain steel stack of the steamer, Island Queen, located at the foot of Broadway street, tied to a wharf-boat. The charges against the two defendants were consolidated and tried together in the municipal court, and both defendants were found guilty. Charles S. Brooks was later charged by affidavit with having violated said ordinance on August 7, 1919, by causing, permitting, or suffering the emission or escape of smoke of a greater degree of darkness and for a longer period than was permitted by the ordinance, from the steel stack of the Island Queen, located in the same place as that charged in the prior affidavit. A trial was had in the municipal court and he was found guilty as charged. Error was prosecuted to this court by the defendants below, and because of the similarity of the charges and the general identity of facts disclosed by the record making most of the questions raised common to all the cases, they were presented together to this court and will be disposed of together.

In the first place the cases raise the question of the jurisdiction of the state of Ohio over the water of the Ohio river. This question has received the attention of the courts of the states along the Ohio river, and of the Supreme Court of the United States almost from the creation of the Federal union. After the Revolutionary war and when the Federal government was in process of formation, the question arose as to the ownership of the vast tracts of land to the northwest of the Ohio river. The Royal Charter held by Virginia included these lands, but yielding to the recommendation of Congress, Virginia in 1781, conveyed to the United States all the territory northwest of the Ohio river, subject to certain conditions, one of which was that the ceded territory should be laid out and formed into states and, construing this Virginia grant, the Supreme Court of the United States in *Handly's Lessee v. Anthony et al*, 5 Wheat., 374. held that the boundary of the state of Kentucky extended to low water mark on the western, or northwestern side of the

Ohio river. Subsequent to the cession the Legislature of Virginia in 1789, by an act known as the Virginia Compact, which proposed the creation of the state of Kentucky out of what was then a part of Virginia, stipulated that the use and navigation of the Ohio river so far as the territory of the proposed state, or the territory shall remain within the limits of Virginia, lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of Virginia and of the proposed states on the Ohio river shall be concurrent only with the states which may possess the opposite shores of the Ohio river. See 13 Hening, St. L., 17. Congress accepted this legislation by Virginia, and the state of Kentucky was created.

This grant by Virginia and the Virginia Compact have been construed by various courts. In the case of *State v. Hoppess*, 1 Ohio Dec. Reprint, 105, it was held that a slave escaping from a boat on the Ohio river, lying above low water mark on the Ohio side, was nevertheless a fugitive slave within the meaning of the Federal Constitution under the act of Congress, and could be reclaimed by the owner; and upon the subject of jurisdiction on the waters of the Ohio the court at page 116 says:

“Thus, for the service of civil and criminal process, it has been repeatedly decided in our courts that the jurisdiction of Ohio and Kentucky was concurrent over the water within the banks of the river, without reference to high or low water mark. True, it has been decided if a boat was attached to either shore, for the purpose of civil or criminal process, the jurisdiction was exclusive in the state to which it was attached.”

The court held in the particular case that inasmuch as the slave had escaped from the boat while navigating the Ohio river, the master could not be said to have brought the slave within the state of Ohio, and that to so hold would be contrary to the spirit of the Virginia Compact, which contemplated the river as a public highway, for the purpose of which it was necessary to use the shore as an incident to navigation.

In the case of *Wedding v. Meyler*, 192 U. S., 573, it was held that the state of Indiana has concurrent jurisdiction with Kentucky on the Ohio river opposite its shore below low water mark.

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From these decisions and many others that could be cited it is clear that while the state of Kentucky owns the bed of the Ohio river to low water mark on the northwestern shore, its jurisdiction on the waters of the Ohio river is concurrent only with that of the states on the northwestern shore of the river. Ohio has the same authority and control on the waters of the Ohio opposite its shore as Kentucky has, and can legislate on the subject of civil and criminal rights and duties on its waters, and execute such laws thereon to the same extent as Kentucky can. This power or jurisdiction in the state of Ohio is conceded by the plaintiffs in error. They deny, however, that a municipal corporation in the state of Ohio, having as one of its boundaries the Ohio river, can legislate by municipal ordinance effective upon the waters of the Ohio river, and that inasmuch as the defendants are charged only with the violation of a municipal ordinance of the city of Cincinnati, to hold that such ordinance was operative on the waters of the Ohio river would be giving to a municipal ordinance extra-territorial operation without any express sanction therefor by the Legislature of the state of Ohio.

It is undoubtedly the law that a municipal corporation can not exercise any extra-territorial authority or jurisdiction without the express authorization of the Legislature of the state from which it derives its being, and if to give this ordinance operation over the waters of the Ohio river opposite Cincinnati is giving the ordinances of the city of Cincinnati operation outside of the corporate limits, the court could not so hold without deciding contrary to the uniform tenor of the decisions.

This situation raises the question of what is included within the territorial confines of the city of Cincinnati. The boundaries of that city as defined by municipal ordinance, as well as by the plats and descriptions, forming the basis of its creation and of which the court takes judicial notice, describes its territorial limits as "Beginning at the junction of the Ohio River," etc., and ends with, "thence southwestwardly along the northerly line of Three Mile road to the Ohio river; thence southwestwardly following the meanderings of the Ohio river to the

western boundary line of the former village of Delhi, the place of beginning." In other words, the Ohio river is made by law the southerly boundary of the municipal corporation of Cincinnati.

It is a general rule of conveyancing that where property is described by reference to monuments the grantee takes all the interest or title of the grantor in the monument. Where a way or stream is referred to as constituting one of the boundary lines the grantee takes all the interest of the grantor in that way or stream. If the grantor owns to the middle of the stream or way the conveyance carries the title of the grantee to the middle, unless by express words the grantor shows an intent to limit the grant to the margin of the way or stream. As was said by the court in *Luce v. Carley*, 24 Wend., 451:

"Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river, if it be above tide, one half the bed of the stream is included by construction of law. If the parties mean to exclude it, they should do so by express exception. Without adhering rigidly to such construction, water gores would be multiplied by thousands along our inland streams small and great, the intention of parties would be continually violated, and litigation become interminable."

The Ohio cases are uniform to the same effect. *Day v. Railway*, 44 Ohio St., 406; *Railway v. Platt*, 53 Ohio St., 254; *Chesbrough v. Head*, 3 C. C. (N. S.), 516; affirmed without opinion in 69 Ohio St., 542.

While ordinarily the grant only carries to the middle of the stream, that is because the presumption is that the parties on opposite sides of a stream or way own to the middle. But where it appears that the grantor owned the entire way or stream, then the grant by implication of law carries title to the entire way or stream to the grantee. *In re Robbins*, 34 Minn., 99; *Watrous v. Southworth*, 5 Conn., 305; *Seery v. Waterbury*, 82 Conn., 567.

It is clear, therefore, that had the state of Ohio owned the fee simple title to the bed of the Ohio river, subject to navigation at the time the municipal corporation of the city of Cincin-

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nati was created, the application of the rules of construction of private conveyance would carry the grant to the bed of the stream. Do such rules of construction apply?

In the case of *Jones v. Soulard*, 24 How., 41, the Supreme Court of the United States had before it the construction of the language used in describing the boundaries of the city of St. Louis to determine whether that city was entitled to accretions to the shore of the Mississippi river, on the bank of which said city was and is located. The court held as stated in the syllabus:

“The eastern line of the city of St. Louis, as it was incorporated in 1809, is as follows: from the Sugar loaf due east to the Mississippi; ‘from thence, by the Mississippi, to the place first mentioned.’

“This last clause made the city a riparian proprietor upon the Mississippi, and, as such, it was entitled to all accretions as far out as the middle thread of the stream.”

The same rule was applied in the case of *Coldspring Iron Works v. Inhabitants of Tolland*, 63 Mass., 492, where it was held that:

“Under a statute by which a stream not navigable is made the boundary of an incorporated territory, the center of the stream, and not the edge or margin, is the true boundary line; and this is so although the monuments are described as standing on the margin or bank of the stream.”

At page 496, the court says:

“The same construction that is given to grants is given to statutes which prescribe the boundaries of incorporated territories. *Inhabitants of Ipswich*, 13 Pick., 431.”

To the same effect is *Flynn v. City of Boston*, 153 Mass., 372.

It can be safely said, therefore, that in determining the boundaries of municipal corporations, at least so far as ownership in corporeal property is concerned, the same construction is to be given to language that would be given were that language used in a deed between private individuals, and that

where one of the boundaries is a river, the proprietary interest of the state in the bed of that river will, by implication of law, be included in the territory erected into a municipality, unless there is express language of exclusion. Does that same rule referable to the physical bed of the river apply to the intangible right or jurisdiction on the water of the river? The Virginia Compact granted to the states "which may possess the opposite shores of the said river" concurrent jurisdiction with Virginia and Kentucky. In other words, so far as jurisdiction on the waters of the river is concerned the state of Ohio, because of its possession of the *shore*, exercises it not to the exclusion of all others, but in common with the states opposite, and of course, subject to delegated jurisdiction of the United States. If the state of Ohio and the states opposite were co-tenants of the physical bed of the Ohio river, it is clear from the authorities that a grant by the state of Ohio of land bounded by the Ohio river would, by implication of law, carry with it the right of Ohio in the bed of the river, which it owned in common with the states opposite.

Now, does the fact that the right of the state of Ohio in the Ohio river is not in the ownership of the bed of the river, but in its control or jurisdiction on the surface of the water of the river, prevent the application of these rules of construction? In other words, is there such a variance in substance or legal effect between ownership of tangible property, and jurisdiction over that property without ownership in the common acceptance of that term, as to call for the application of some other rule of construction? In the legal sense, property does not necessarily mean the tangible thing. All property in one aspect is intangible, although it may be referable to land or tangible chattels. Property is the right and interest which a man has in lands and chattels to the exclusion of others. As is stated in *Low v. Rees Printing Co.*, 24 L. R. A. (Neb.), 702, at 709:

"Property in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition which may be acquired over it."

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The same definition is stated in many cases, among which is *Rigney v. Chicago*, 102 Ill., 64. And nowhere more than in Ohio have the courts developed and emphasized the incorporeal character of rights, in and to corporeal property, and accorded protection to such incorporeal rights when the general ownership or title was in the sovereign state. *Crawford v. Delaware*, 7 Ohio St., 460 at 470; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St., 264, at 282; *Traction Co. v. Parish*, 67 Ohio St., 181, at 190.

When property rights are viewed in this sense the distinction between them and jurisdiction over a given locality exercised by a sovereign becomes vague. "Jurisdiction" which was given the states possessing the "shore" of the Ohio river, is nothing more than the right to prescribe and enforce the rules of conduct to be observed on the waters of that river. It is the right of dominion over them, and is of the same incorporeal character as are the rights of property. While the Virginia grant of cession limited the title of the states created out of the northwest territory to the bank of the river above low water mark, the Virginia Compact did give to these states possessed of the "shore" of the Ohio river certain rights on and over the waters of the river which, whether denominated as jurisdiction, dominion or property, did attach to the northwest "shore" of the river; and when such a state created a political subdivision or municipal corporation, bounding it by the river, it is the opinion of the court that that grant carried with it to the political subdivision or municipal corporation the jurisdiction over the water of the Ohio river to the extent that the political subdivision or municipal corporation was given the right to exercise jurisdiction as an agency of the state within its boundaries.

In creating, or permitting to be created a municipality bounded by the Ohio river, the state was conveying or bestowing upon that municipality governmental powers principally, and any transfer of rights in property was merely incidental and all were given to be held in trust for the state to which they all—governmental and proprietary—revert when the municipality ceases to exist. The principal subject of conveyance in the

creation of a municipality being governmental powers, it is of the same character of right that the state has over the waters of the Ohio river, and the state having the power to confer such authority upon municipal corporations within prescribed boundaries there seems no reason to hold otherwise than that such a grant includes the power or jurisdiction to the full limit of the boundaries in so far as the state has such jurisdiction to bestow.

In *State v. Faudre*, 63 L. R. A. (W. Va.), 877, at 879, the court approved this statement of the power given by the Virginia Compact to the states possessing the "shore" of the Ohio river:

"Jurisdiction unqualified being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction must entitle Indiana to as much power—legislative, judicial and executive—as that possessed by Kentucky over so much of the Ohio river as flows between them."

And in *State v. Faudre, supra*, the Supreme Court of West Virginia gave full effect to an ordinance of the city of Gallipolis, granting a ferry license to Faudre, to the same extent as though it had been granted directly by the state of Ohio.

The conclusion to which the court has come on this subject makes it unnecessary to consider the question of whether the Island Queen was at the times in question north or south of low water mark. The trial court in cases No. 171903, and No. 171904, found as a matter of fact that the Island Queen was north on the Ohio side of low water mark at the time, and in case No. 172794, the court made no finding upon that subject at all, but found generally that the defendant was guilty. This court reviewing the judgments of the municipal court would not be disposed to disturb the findings of that court upon the question of fact, where the evidence was as it is in these cases, conflicting, but being of the opinion that it is immaterial whether the Island Queen was north or south of low water mark, the court has not examined the record in either of these cases for the purpose of determining whether the finding of the municipal court upon that subject is so manifestly against the evidence

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as to have required a reversal in the event the correctness of the judgments below depended thereon.

The plaintiff in error offered to prove in the trial court that the *Island Queen*, at the time in question, was being operated under a license issued to it by the United States Government under Sections 8151 to 8254 of the United States Compiled Statutes of 1918. The law provides for the inspection and licensing of steam vessels engaged in navigation on the navigable rivers. It is urged that even assuming that the city of Cincinnati has jurisdiction over the waters of the Ohio river touching the Cincinnati shore, that jurisdiction is subordinate to the maritime and interstate commerce jurisdiction of the United States Government, and that the Federal Government by the aforesaid laws has assumed to legislate on the subject of steam vessels on the waters of the Ohio river, and that to construe this ordinance as applicable to steam vessels on the waters of the Ohio river, would cause it to conflict with the Federal law and thereby render it unconstitutional, which is not permissible under established rules of construction, and if permissible the ordinance would be thereby invalidated and the convictions erroneous. If the premise is correct the conclusion is unavoidable.

In the case of *Burrows v. Delta Transportation Co.*, 29 L. R. A. (Mich.), 468, the Supreme Court of Michigan had before it a case involving the validity of a state statute requiring all vessels using wood for fuel while navigating the waters of the state to be provided with suitable fire screens to prevent the escape of sparks. At that time there was an act of Congress creating a board of inspectors of vessels, with certain authority to require conformity with its decisions. The Supreme Court of Michigan held in that case that,

“A state statute requiring all vessels using wood or fuel while navigating waters of the state, to be provided with suitable fire screens, does not conflict with acts of Congress, or regulations of supervising inspectors, and is not an interference with interstate commerce.”

In the case of *Harmon v. City of Chicago*, 110 Ill., 400, the court had before it the question of the validity of a city ordi-

nance declaring dense smoke to be a public nuisance, and also the question of the applicability of that ordinance to the owner of a boat engaged in interstate commerce, and the court held:

“Where a conflict may arise between a state and the general government as to legislation committed to Congress, Federal authority must always prevail, for the reason that legislation in pursuance of the Constitution of the United States is the supreme law of the land. In some instances the state and general government may exercise concurrent jurisdiction in certain matters, and until the general government sees proper to act, state legislation is warranted, and the power of the state over such subjects is plenary.

“The existence of a power in Congress to control harbors, and the towing in and out merchant vessels engaged in commerce with foreign nations and with the several states, does not of itself prevent local legislation for the security of property, and the health, comfort and convenience of the people in a municipality. It is only repugnant and interfering state legislation that must give way to the paramount laws of Congress constitutionally enacted.

“A state has all power necessary for the protection of the property, health and comfort of the public, and it may delegate this power to local municipalities in such measure as may be deemed desirable for the best interests of the public; and the state may resume it again when deemed expedient.”

And at page 407, the court says:

“But does this ordinance impose any restraint on the use of such vessels, although engaged in general commerce, other than is consistent with law? It is thought it does not. At most it purports only to regulate their use in such manner as may not produce effects detrimental to property and business, and become a personal annoyance to the public at large within the city, and that is allowable to be done.”

And at page 408:

“Regulating the use of fuel, or, what is the same thing, requiring owners or managers of tug-boats to so use their vessels so as not to create a dense smoke, which it is conceded would be an annoyance to the public at large, is in no sense imposing any restraint upon commerce, nor does it in any manner conflict with the powers of Congress under what is called the ‘commerce clause’ under the Constitution of the United States.”

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Whenever the state of Ohio exercises any jurisdiction over the waters of the Ohio river, it touches and affects the agencies of interstate commerce. To hold that the mere fact that a state law operates upon the instrumentalities of interstate commerce, and incidentally affects interstate commerce renders the law unconstitutional, would deprive the state of all jurisdiction over the waters of the Ohio river and render the grant made by Virginia, by and with the consent of the Federal Government, of concurrent jurisdiction with the state of Ohio, meaningless. It is only where the state law in effect regulates interstate commerce that it is in violation of the Federal Constitution. The existence of the power in the Federal Government to regulate interstate commerce does not in any sense deprive the state of its police power to make and enforce laws to protect the public health, public safety and the public morals. 5 Rulings Case Law, 702 and 703. Crimes, as defined by Ohio statutes, committed by those engaged in interstate commerce on the Ohio river are punishable by the state of Ohio when those acts violate the criminal law of this state, and the court can see no distinction between the commission of the crime of creating a nuisance by the escape of smoke upon the Ohio river and any other class of crimes.

It does not appear from this record that there was anything that would prevent the Coney Island Company from refraining from creating, or having created, or from abating this nuisance. That the state criminal laws are binding upon those engaged in interstate commerce, has been uniformly held. *Wiggins Ferry Co. v. Reading*, 24 Ill. App., 260; *State v. Cameron*, 2 Chand. (Wis.), 172; *Carlisle v. State*, 32 Ind., 55; *Welsch v. State*, 126 Ind., 71; *State v. Mullen*, 35 Iowa, 199.

The constitutionality of municipal ordinances declaring dense smoke to be a nuisance, and prescribing tests for determining the density of smoke, has been upheld by the courts against the charge that they violated the due process, equal protection, and private property inviolability, clauses of federal and state constitutions. *Northwestern Laundry Co. v. Des Moines*, 239 U. S., 486; *Harmon v. Chicago*, *supra*, and *Cincinnati v. Burk-*

hardt, 10 C. C. (N.S.) 495. In the latter case the ordinance prescribed a scale for measuring the density of smoke similar to that prescribed in the ordinance now under consideration. The fact that a law prescribes such a standard of conduct that the determination of whether or not any specified conduct conforms to the standard, depends upon the opinion of the triers of the facts, and therefore as variable as the types of mind, does not render the law unconstitutional, was held in the case of *State v. Schaeffer*, 96 Ohio St., 217.

The ordinance upon which this prosecution is based declares that smoke of a certain degree of darkness shall be held to be dense smoke, and the emission or escape thereof *within* the city of Cincinnati from any smoke stack is declared a *nuisance*, and that any person, firm or corporation, or any employee thereof, who *shall create or cause the nuisance*, or who shall *permit or suffer* the same to exist, shall be deemed guilty of a misdemeanor.

What is meant by the words, "within the city of Cincinnati?" If the court is correct in the conclusion that the state of Ohio had power to and did clothe the city of Cincinnati with certain jurisdiction over the Ohio river, and that by a proper construction of the description of the territory, the municipality extends over the waters of the river for certain purposes, then an act committed on the waters of the river would be committed legally "within" the city of Cincinnati. It has been uniformly held that where a crime was committed on the Ohio river, venue was properly laid in the county possessing the opposite shore. *State v. Savars*, 15 C. C. (N. S.), 65; *State v. Kendle*, 8 N. P. (N.S.), 109, and many cases in other jurisdictions. If it were not true that Cincinnati had jurisdiction over the place where the nuisance originated, the court would be inclined to hold that a proper construction of the ordinance makes it inhibit the smoke nuisance within the city, and that the reference to the smoke stack or chimney was simply for the purpose of designating the source or instrumentality by means of which the nuisance was created. The smoke in the air coming in contact with the property in Cincinnati, and being in the air breathed by persons in Cincinnati, thereby affecting the public health, comfort

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and property, was the nuisance legislated against and not the mere emission or escape of the smoke regardless of whether it was immediately reconfined or allowed to pollute the air. Unless smoke was in fact a nuisance, it could not be made so by an arbitrary legislative mandate. *Harmon v. Chicago, supra*; *Cincinnati v. Burkhardt, supra*. If this construction is correct, then the offense was committed where the smoke nuisance took effect, and that was within Cincinnati, exclusive of waters of the Ohio river. *Strawboard Co. v. State*, 70 Ohio St., 140.

A decision of the case also requires a construction of the words "permit or suffer," as used in this ordinance. The defendants did not individually own the Island Queen. It is owned by a corporation, of which the defendant Brooks was president, and the defendant Dickow an employee. What relation to the nuisance must be shown in order to hold officers and employees of the corporation under this ordinance for creating or causing or permitting or suffering the nuisance?

In the case of *Cincinnati v. Burkhardt, supra*, it was held:

"The defendant Burkhardt is charged, as president and general manager of the Gibson House hotel, with unlawfully permitting the emission and escape of smoke. It is admitted in the record that he is president and general manager of the A. G. Corre Hotel Company, which runs the Gibson House, and was at the time complained of. But it does not appear that he personally permitted, or had anything to do with the nuisance of the smoke. Under the ordinance the corporation permitting the emission of smoke, or the employee causing it, should have been prosecuted."

This question has frequently arisen when it was sought to hold the landlord on account of gambling conducted on his premises, and a case of this character is *Thompson v. Ackerman*, 21 C. C., 740, the syllabus of which is as follows:

"An owner of leased premises who has knowledge that the lessee is using the same for gambling purposes and who does nothing whatever to hinder or prevent the lessee in such use, must be held to 'knowingly permit' such use within the meaning of Section 4275 of the Revised Statutes."

And at page 746 the court say:

“ ‘To permit’ means either, first, ‘to suffer or allow to be,’ come to pass or take place, ‘by tacit consent or by not prohibiting or hindering,’ or second, ‘to grant leave or liberty to, by express consent; to allow expressly.’ If being in actual possession he permitted within the one meaning or the other, he would be liable criminally under the gambling statute, Section 3682 of the Revised Statutes.”

In the case of *Larson v. Christianson*, 14 N. Dak., 476, 481, the court says:

“The word ‘permit’ as here used, means that the unlawful use is allowed to continue after knowledge or notice thereof. It does not mean that the nuisance exists, but that it exists with the consent or acquiescence of the owner.”

In *People v. Conness*, 150 Cal., 114, at 121, the court says:

“The word ‘allow’ here means more than mere ‘abstinence from prevention,’ as the court below defined it in an instruction given to the jury. It has almost the identical meaning of the word ‘permit,’ also used in the statute. It implies some sort of assent on the part of the husband. There must be some active wish, or at least willingness, in his mind, after he had knowledge of her presence in the house, that she should continue there; something more than mere indifference to her whereabouts or passing sufferance in a case where the circumstances do not call upon him to interfere with her conduct.”

The rule as to the criminal liability of an officer of a corporation for acts done in relation to the corporate business, is stated in Vol. 4, of Fletcher’s *Cyclopedia Corporations*, Section 2725, in this language:

“A corporate officer is criminally liable where he is the actual present and efficient action behind the corporation. On the other hand, the officer is generally held not liable unless he participates in the unlawful act, either directly or as an aider, abettor or accessory, and this is so even though the offense is the violation of a statute which imposes imprisonment as a penalty. A corporate officer without regard to his position, is ordinarily not criminally liable for corporate acts performed by other officers or agents of the corporation. But it has been held

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that it is not necessary to the conviction of an officer for nuisance that he should have been actually engaged in work upon the premises.”

Many cases are cited by the author to sustain the various propositions stated in the text. The author cites *People v. Detroit White Lead Works*, 82 Mich., 471; 9 L. R. A., 722, as sustaining the proposition stated in the last sentence quoted. In that case it was found as a fact however, that the nuisance was caused by a business while being conducted in a careful manner without anything being done that was not a necessary and reasonable incident to its proper conduct. The case of *Overland Cotton Mill Co. v. People*, 32 Colo., 263, is also referred to by the same author as going to the extreme limit in holding corporate officers criminally. It was a case in which a corporate officer was held liable for violating a statute that prohibited any person from employing a child under fourteen years of age in a factory, and the court held that inasmuch as the defendant had authority to hire employees, and because of his relation to the corporation he either knew or by the exercise of reasonable care should have known, that the minor under the prohibited age was in the employ of the corporation, he had been properly convicted.

The rule deducible from the authorities seems to be that where a nuisance is created upon premises in the possession of a corporation, those actively engaged in the creation of the nuisance are liable criminally; and that where the nuisance is caused by the conduct of the business in the usual and customary way, those officers in control of the corporation must be deemed to have created or caused the nuisance, but, that an officer or employee of the corporation not participating in fact or by implication of law in the creation of the nuisance is not liable unless knowing of the existence of the nuisance and having power to abate it, he allows it to continue.

The court having already concluded that the record discloses proof of the *corpus delicti* and that the venue had been propounded, it remains to apply the law to the facts disclosed by the records to determine whether the defendants have been properly convicted of the commission of the offenses.

In case No. 171904, the only connection of C. S. Brooks with the offense is the admission that at the time the offense was committed he was president of the corporation owning the Island Queen, and was actually engaged in the operation of the boat. This admission goes no further than the admission contained in the record of the case of *Cincinnati v. Burkhardt*, 10 C. C. (N.S.), 495, the pertinent part of which has already been quoted, and the court concluded that the president of the corporation was not liable.

The authority of that case is binding upon this court, and in accordance therewith, the court holds that the defendant Brooks in case No. 171904, was improperly convicted and said conviction is therefore reversed.

In case No. 171903, it was admitted that the defendant Dickow was the chief engineer and actually engaged in the operation of the Island Queen, and in addition thereto, that he was working as chief engineer on the Island Queen at the time the offense was committed and while it was moored at the foot of Broadway. The defendant Dickow being chief engineer and being personally present at the time and place the offense was committed, is evidence that he participated in the creation of the nuisance, and knowing of its existence and having power to abate it, allowed it to continue.

The judgment of the municipal court is affirmed in this case, No. 171903.

In case No. 172794, the defendant Brooks was shown to have been the president of the corporation owning the Island Queen, actively participating in the management of its business, and in addition thereto, had several times prior to the date laid in the affidavit, been notified on various occasions that the Island Queen was being so operated as to cause a smoke nuisance, in violation of the municipal ordinance, and warned to take the proper precautions to prevent or abate the nuisance. The record also shows that the nuisance was continued intermittently for some months and that the defendant took no effective means either by installation of new appliances or by prohibitory commands to the employees so as to prevent a recurrence of the

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nuisance, and the court therefore holds that under the law, the record discloses evidence against the defendant Brooks in that case, that knowing of the existence of the nuisance and having power to prevent its recurrence he refrained from doing so, and therefore, the judgment of the municipal court in case No. 173794, finding him guilty of a violation of this ordinance should be affirmed.

ILLEGAL COMMITMENT BY A NOTARY FOR CONTEMPT.

Probate Court of Montgomery County.

STATE, EX REL CARL FOWLER, v. WILLIAM C. OLDT.

Decided, April 5, 1920.

Depositions—Refusal of Witness to Answer Questions Propounded by a Notary Not Necessarily Contempt—Power of Notary to Commit for Refusal Limited to Refusal to Answer Proper Questions or Produce Papers Competent as Evidence—Examinations under Section 11497.

A plaintiff, summoned to give his deposition in an action for damages for alienation of affections, is unlawfully committed for contempt in refusing to answer as to the source of information upon which he has based his suit.

ROUTZOHN, J.

This is an action in habeas corpus brought on relation of Carl Fowler against William C. Oldt, as Sheriff of Montgomery county, Ohio, seeking the release of said Fowler from the Montgomery county jail, to which place he was committed by S. N. Froehle, a notary public in and for said county, for contempt in refusing to answer a certain question propounded to him and for refusing to re-appear before said notary, when commanded so to do as alleged and more specifically set forth in the commitment.

A brief statement of the facts, sufficient for the present consideration of the cause, is as follows:

On the 25th day of March, A. D. 1920, relator by subpoena was caused to appear in the office of Egan & Delscamp, 803-4-5-6 Schwind Building, Dayton, Ohio, to testify, in a deposition sought to be obtained for use, as alleged, in a cause pending in the common pleas court of Montgomery county, wherein Carl Fowler is plaintiff and J. A. Guncheon is defendant and in which cause Fowler is asking for an award of damages against Guncheon because of the alleged alienation of the affections by Guncheon of Fowler's wife.

The notary before whom Fowler was subpoenaed to appear being absent at the time said deposition was to be taken, by agreement of counsel the notary, S. N. Froehle, was substituted, relator was sworn and the proceeding commenced.

The record of the proceeding, as set forth in the commitment, is as follows:

Examination by Mr. Delscamp:

Q. You filed the petition against James A. Guncheon for alienation of affections in the court of common pleas, of Montgomery county, Ohio, on the 20th day of March, 1920, didn't you?

A. Yes, sir.

Q. In that petition you alleged that James A. Guncheon had induced your wife, Beatrice Fowler, to accompany or to meet him in Cincinnati, Ohio; is that right?

A. Yes, sir.

Q. Where did you get the information from? (Objected to.)

Mr. Delscamp: All right I ask that he be committed to jail.

The question to which objection was made was then read to the witness.

The Notary: You heard the question read there, do you refuse to answer?

Mr. Holland: Yes, we refuse an answer that question. If you want Mr. Fowler—If you want to send the sheriff over there you will find him in my office.

Mr. Delscamp: We are not through with the deposition yet, we are not through with the testimony of Mr. Fowler yet on cross-examination.

Mr. Holland: Well, go ahead with your deposition.

Thereupon the witness and his counsel left the office.

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The testimony reveals that after the objection was made, a heated argument ensued between George F. Holland, attorney for Fowler and Irvin C. Delscamp, attorney for Gucheon, anent the competency of the question; that Mr. Delscamp asked no further questions, although requested by Mr. Holland to proceed, but insisted upon an answer to the question propounded; that instead of proceeding to question the witness further, Mr. Delscamp began to examine law books, presumably for the purpose of finding some law bearing upon the competency of the question, or of determining what method should be pursued in committing Fowler to jail.

After thus waiting about five minutes, according to the testimony of the notary, Mr. Holland and relator left, as above noted. The notary made no attempt to stop them from leaving, nor did he caution them not to do so.

This was about 2.30 p. m. About one hour thereafter the notary phoned Mr. Holland, who, with relator, was at his office, and asked if relator would return to answer the question, but met with a refusal.

Between five and five-thirty p. m., the notary again phoned Mr. Holland and demanded Fowler to return and answer the question, with the same result; whereupon the commitment was issued and Fowler was incarcerated in the jail.

Was Fowler guilty of contempt by reason of his refusal to answer the propounded question?

The notary, in this instance, was acting within his rights, by virtue of his office and the agreement herinbefore mentioned, in the taking of the deposition; at least, no claim is made to the contrary.

In granting authority for the enforcement of those rights, Section 11510 of the General Code provides:

“Disobedience of a subpoena, a refusal to be sworn, except upon a failure to pay fees duly demanded, and *an unlawful refusal* to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required.”

The court in quoting this statute has emphasized the words “an unlawful refusal.”

It is well known that the officer who takes a deposition has no authority to pass upon the relevancy or competency of a propounded question; this must be left of the court before whom the cause is to be tried.

The language of the section quoted implies that it may not be unlawful for a witness to refuse to answer certain questions.

In accordance with this implication, or rather qualification of the officer's authority to punish a witness for refusing to answer, the Supreme Court of Ohio has held:

"A witness whose deposition is being taken before an officer may refuse to testify to facts not relevant to the issues in the case in which the deposition is to be read, if the disclosure of such irrelevant facts would be injurious to the business of the witness; and, imprisoned by the officer for such a refusal, he may be discharged on habeas corpus. *Ex Parte Malcolm Jennings*, 60 Ohio State, 319.

In this case the prisoner was discharged, having been committed to jail for refusing to answer certain questions which the Supreme Court found to be irrelevant.

In the opinion, page 329, Shauck, J., states "the settled law on the subject" by quoting from Church on habeas corpus, section 319:

"The law has not investigated such officers (notaries public) with arbitrary and omnipotent power to compel a witness to answer all questions however incompetent, irrelevant, immaterial or inadmissible. A refusal to answer such questions is not necessarily a contempt. To have power to commit for contempt, the notary must exercise his functions substantially in the manner and under the circumstances prescribed and contemplated by law. It has, therefore, been held that a witness will be discharged on habeas corpus where he has been committed for contempt by a notary public for failure or refusal to produce papers and testimony that are incompetent and inadmissible."

The court has carefully and conscientiously examined numerous authorities, including those cited by counsel on both sides, and they all substantiate the above quoted rule of law.

Having in mind the issues involved in the case of Fowler against Gunchcon, the cause for which this deposition was

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being taken, the court finds that the question which Fowler refused to answer and for which refusal he was committed for contempt was irrelevant and immaterial, and, therefore, an incompetent question.

In addition, this court feels that Fowler acted wisely and within his rights in refusing to divulge the names of the witnesses upon whom he might be compelled to rely for testimony in substantiation of the allegations of his petition and the successful prosecution of his cause of action.

The fact that by divulging the names of his witnesses Fowler might be injured in the prosecution of his cause is so obvious that further comment is not required.

Besides, the court, in so finding, is fortified by a recent decision of the Supreme Court, in a case wherein the facts and finding are strikingly similar.

It is to be found in *Ex Parte Schoepf*, 74 Ohio State, page 1.

The fourth syllabus, page 2, reads as follows:

“While an officer before whom a deposition is being taken is empowered to punish as for contempt any person who refuses to obey an order to answer a question or to produce a document, he can not do so unless it is so “lawfully ordered;” and where such question or document is not pertinent to the issues tendered or made, or is not material or necessary to make out the case of the party calling for it, or is incompetent or privileged, the witness can not lawfully be ordered to answer such question or to produce such document.”

In that case, the deposition was being taken ostensibly to be used in an action for personal injuries instituted in the common pleas court of Hamilton county by one Josephine Pace against the Cincinnati Traction Company.

The person incarcerated for contempt was the claim agent of the defendant company, and the deposition was being taken on behalf of plaintiff.

The witness testified that he had in his possession certain reports of the accident, containing the names and statements of the witnesses to same.

When asked to produce them, he refused. This was one ground of the alleged contempt.

He was also asked the following questions, all of which he refused to answer and for which refusal also the notary held he was in contempt.

Q. "On the seventeenth of May, 1902, a woman fell or was thrown off a car belonging to the Cincinnati Traction Company, at or near the corner of Oak and Belmont streets, College Hill; who was the conductor in charge of this car?

Q. Do you know the name of this conductor.

Q. Do you know the name of the motorman on this car?

Q. Were there any other persons on this car besides the plaintiff, conductor and motorman?

Q. Were there any persons that you know of, besides the plaintiff, conductor and motorman present at the time of the accident and who witnessed it?

Q. Who was the division superintendent in May, 1902, of the division to which College-Hill-Main line belonged?"

The Supreme Court in this case found that the production of the document was not material and necessary to the plaintiff's case; that the questions were incompetent, immaterial and irrelevant; that the purpose was to compel the defendant to disclose before the trial the sources of its information and the names of its possible witnesses and discharged the petitioner.

Was Fowler guilty of contempt in refusing to re-appear before the notary when the demand was made, by the notary on counsel, Mr. Holland?

As heretofore stated, no objection—no serious objection, at least—was made as to his leaving the office; furthermore he is not charged with contempt for leaving the office without permission.

Mr. Delscamp has been requested to continue with the cross-examination, but he refused to question the witness further until the one particular question was answered.

The facts bear out the inference that the remainder of the afternoon following Fowler's departure was occupied by the notary and Mr. Delscamp in drafting the commitment papers.

Also, the request that Fowler re-appear was accompanied with the notary's demand that he answer the one question which he had refused to answer.

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There is nothing in the commitment, nor in the testimony, by which anything else can be inferred but that sole desire to have Fowler re-appear was to compel him to answer the question which had already been propounded.

A different procedure is provided for compelling a witness to obey a subpoena. Section 11511 of the General Code provides, in part, that

“When a witness fails to obey a subpoena personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt.”

Section 11518 of the General Code provides:

“While a prisoner’s deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the deposition.”

This procedure was not followed in Fowler’s case. The law as well as the method of compelling his appearance is clear and should have been strictly followed. The law does not sanction arbitrary power and will not permit a man to be deprived of his liberty without due process of law.

The court having determined that Fowler is unlawfully deprived of his liberty, he is hereby discharged.

**PROCEDURE OF COUNTY COMMISSIONERS AND TOWNSHIP
TRUSTEES WITH REFERENCE TO IMPROVE-
MENT OF A HIGHWAY.**

Common Pleas Court of Franklin County.

**FRED W. ATCHERSON, COUNTY COMMISSIONER, ET AL V. C. M.
MORAIN, TRUSTEE, ET AL.***

Decided, December Term, 1919.

*Roads—Improvement of with State Aid—Liability of Townships to
County for Share of Cost—Apportionment among Abutting Prop-
erty Owners—Construction of Amended Section 1200.*

1. Section 1200, General Code, as amended in 103 O. L., 455, is permis-
sive in form and substance and does not compel the county com-
missioners to require of township trustees the procedure therein
mentioned as a condition precedent either to the construction of
the proposed improvement or to the liability of the township and
the abutting property owners upon completion of the improvement.
2. Where a highway improvement has been made with state aid granted
on application of the county commissioners, in accordance with
highway laws as amended in 103 O. L., 449, etc., the township or
townships through which said improvement passes are under a
liability to the county for the townships' share of the cost as de-
fined in Section 1208, General Code (103 O. L., 456), and the trus-
tees thereof are, in such cases, required to apportion the amount
to be paid by the abutting property owners according to the bene-
fits accruing to the owners of the land so located, unless such
share has been waived and assumed by the county commissioners
upon a resolution adopted by them as provided in Section 1210-1
General Code (103 O. L., 457).

*Hugo N. Schlesinger, prosecuting attorney and John H. Sum-
mers, assistant prosecutor, for plaintiffs.*

Donaldson & Tussing, contra.

SOWERS, J.

Two actions are brought by the prosecuting attorney upon
behalf of the county commissioners against the trustees of

* Affirmed by the Court of Appeals for the Fourth District, June 16, 1920.

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pleasant township, Franklin county, Ohio, asking for a mandatory writ in one cause of action, commanding the defendants to make a certain apportionment among the abutting property owners for the improvement of a highway passing through said Pleasant township, and that they be required to certify to the auditor of Franklin county, Ohio, for collection the amount so apportioned, and in the other cause of action praying for a money judgment against the trustees of the township for their three-fifths of a twenty-five per cent. apportionment to cover costs of the improvement of said highway.

The petitions set out that the county commissioners, by proper resolution, in December, 1913, found that the public interest demanded the improvement of Section H, inter-county highway, No. 50, situate in said Franklin county and running southwesterly through Franklin, Jackson and Pleasant townships to its intersection with the boundary line of Pickaway and Franklin counties.

The petitions further state that the contract for the construction of the road was finally let by the state highway commissioner to one W. O. Jewett for the sum of \$43,000 and that by a supplemental contract thereto, an additional contract was let to said Jewett for the sum of \$1,400 making a total for engineering and superintendence covering the original and supplemental contracts of \$46,277.82, of which sum the commissioners of Franklin county paid \$23,138.92 and the state of Ohio paid the sum of \$23,139.90.

The petitions further allege that the county commissioners did not waive any part of the apportionment of the costs and expenses as provided by law to be paid by the townships and abutting property owners, and guaranteed that said sum, necessary for said improvement would at all times be available when needed in the construction of said highway.

The defendants filed a general demurrer to both petitions. The demurrers are based upon the construction of certain statutes contained in the General Code, numbered from 1200 to 1210-1 inclusive, and particularly Section 1200, which in its original form (99 Ohio Laws, page 310), provided that before

their approval (the county commissioners), they shall require that the township or townships through which the road extends *shall* pay twenty-five per cent. of the costs thereof, and that the trustees, by resolution thereof, *shall* approve its construction. This section was amended in 1911, Vol. 102 O. L., page 341, Section 26, so that the wording of the section was changed in some particulars, but the important change was that the word "shall" became "may" and it now provides that before their approval of the proposed highway improvement the county commissioners *may* require that the trustees of the township or townships through which the road extends agree to pay twenty-five per cent. of the cost and expense thereof and approve its construction. Defendants claim by reason of the failure of the commissioners to follow this statute and their failure to give any notice to the trustees, that they were justified in refusing to pay the township's apportionment as fixed in Section 1208.

Section 1200 of the General Code must be construed in connection with the following sections, which were passed or amended at the same time. When the original section was passed it was mandatory under the provision of Section 1200 for the commissioners before making a highway improvement to require the trustees of any township through which the proposed improvement was to extend to assume in the first instance, by proper resolution, the apportionment of twenty-five per cent. thereof, but after its amendment, when the word "shall" was changed to "may" construed in connection with the following sections of the code relating to the improvement of highways, this action on the part of the county commissioners requiring them to have the township trustees agree to pay twenty-five per cent. and to approve the construction of the proposed highway became optional with the commissioners and does not support the claim that the trustees of a township must be notified in advance of such proposed improvement, or that the commissioners are compelled, as a condition precedent to the township's and abutting owner's liability, to require the township trustees to approve by resolution the construction and agree to pay any part of the cost thereof.

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At the time of the adoption of Section 1200, Sections 1206 to 1210 inclusive, appearing in 99 Ohio Laws, 314, were as follows:

“Section 1206. One-half of the cost and expenses of the construction of the improvement shall be paid by the treasurer of state upon the warrant of the auditor of state issued upon the requisition of the state highway commissioner, from a specific appropriation made to carry out the provisions of this chapter.

“Section 1207. One-half of the cost and expenses of such improvement shall be paid by the treasurer of the county in which the highway is located upon the order of the county commissioners, issued upon the requisition of the state highway commissioner, from any funds in the county treasury for the construction of improved highways under the provisions of this chapter. One-half of the amount so paid by the county shall be apportioned by the county commissioners to the township or townships and the abutting property as provided in the next section.

“Section 1208. One-fourth of the cost and expense of such improvement shall be apportioned to the township in which such road is located. Of the amount so apportioned to the township, three-fifths shall be charged upon the whole township and two-fifths shall be a charge upon the property abutting on the improvement. The township trustees shall apportion the amount to be paid by the abutting property according to the benefits accruing to the owners of lands so located. At least ten days' notice of the time and place of making such apportionment shall be given to persons affected thereby, and an opportunity given them to be heard in the manner provided by law for the assessment of the costs of establishing county roads.

“Section 1210. The township trustees shall certify the assessment to the county auditor, who shall place it upon the tax duplicate against the property benefitted. The county treasurer shall collect such assessment in the same manner as other taxes are collected, and in such payments as may be approved by the county auditor. The township trustees shall pay the portion of the costs and expenses assessed to the township in the same manner as other claims are paid.”

These sections were amended by the act of May 31, 1911, but said amendments did not change the percentages which were to be assumed by the township or townships and the property owners, nor did they affect the mandatory terms requiring

the township or townships and abutting property owners to bear their share of such improvement. When these sections were amended in 1911, there was also adopted at the same time Section 1210-1, 102 Ohio Laws, 344, which provides as follows:

“Section 1210-1. The county commissioners of a county in which a highway is constructed under the provisions of this act may, by resolution, waive any part or all of the apportionment of the cost and expense of such highway as herein provided to be paid by the township or townships or abutting property owners, and assume any part or all of the cost and expense of such highway improvement in excess of the amount received from the state up to the entire cost and expense of such highway improvement without any assessment whatsoever upon any township or townships or the property abutting on such highway. The township trustees of any township in which a highway is constructed under the provisions of this chapter may, by resolution, waive any part or all of the apportionment of the cost and expense of such highway as herein provided to be paid by the county or abutting property owners and assume any part or all of the cost and expense of such highway improvement without an assessment upon the county or owners of abutting property upon such highway.”

While this section was slightly amended in Volume 103, Ohio Laws, it remains substantially in its original form.

It thus appears from these sections and the amendments thereto that the state had adopted a policy for the improvement of its public highways, namely that fifty per cent. of the cost thereof should be paid by the state and the remaining fifty per cent. by the county, in which the roads were improved, and of this fifty per cent., twenty-five per cent. of the cost thereof should be paid by the township or townships through which the improved road extended, three-fifths of the twenty-five per cent. by the township and two-fifths thereof by the abutting property owners. These provisions of the General Code in their original form at the time of the adoption of Section 1210-1, G. C., were all mandatory and the above proportions of the improvement had to be paid by the respective parties in these proportions. No question could have been raised as to these proportions or the form or procedure at that time, namely when

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the sections were originally adopted. However, as the improvement of the public highways progressed it was found expedient to alter the original provisions and give the county commissioners and township trustees some option as to the expense and the proportion of the costs which they would assume respectively. In other words, the counties might bear any part or all of the expenses of any improvement within its borders and likewise the townships might bear any part or all of the costs of such improvement within its borders. These amendments were unquestionably made to fit the varying conditions which prevailed throughout the state and the ability of the various parties to pay.

When these amendments were made, giving the counties and township trustees options as to the proportions which they would or should pay, it was necessary for the Legislature to have conformity in the provisions of said statutes, and therefore Section 1208 was amended by including at its beginning "except as otherwise provided," that is, unless the county or townships agreed to pay more than their respective proportions as provided in Section 1210-1, then it was mandatory upon them to pay the amounts fixed by Section 1208. It therefore appears that the amendment did not release the respective parties of their obligations to pay their proportions as established by the statutes unless the commissioners took action as provided by Section 1210-1, whereby the township or townships might be relieved by resolution of the commissioners. It would seem that Section 1210-1 gave the county commissioners authority by resolution to waive any part or all of the apportionment provided to be paid by the township or townships or abutting property owners and giving them (the commissioners) authority to assume any part or all of the cost and expense of such highway improvement in excess of the amount received from the state. This did not create a new or different obligation, as it had already existed, but gave the commissioners the power and authority, by proper resolution, to waive the apportionment to be paid by the township or townships. The ten days notice provided for in Section 1208, refers to the time to be given the abutting property owners of the time and place of

making such apportionment and does not relate to the time of making the improvement.

It appears in the petition that the county commissioners did not waive by resolution or otherwise the twenty-five per cent. which was chargeable to the townships through which the improved road extended, and it therefore follows, notwithstanding the failure of the commissioners to avail themselves of the permissive provisions of Section 1200, G. C., that the petitions state causes of action and that the demurrers should accordingly be overruled.

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**INHERITANCE TAX ON PROPERTY FOUND IN OHIO BELONGING
TO A NON-RESIDENT DECEDENT.**

Probate Court of Hamilton County.

IN THE MATTER OF THE INHERITANCE TAX ON THE SUCCESSION
TO PROPERTY IN THE STATE OF OHIO BELONGING TO THE
ESTATE OF J. C. ELLERHORST, LATE OF BELLEVUE, KY.

Decided, August 2, 1920.

Taxation—Protection Accorded to the Personal Property of a Non-Resident Decedent—Renders it Subject to the Ohio Inheritance Tax—Some of the Items of Personalty Liable to Said Tax.

The decedent was a citizen and resident of the state of Kentucky, doing business in Cincinnati, Ohio. In fixing the inheritance tax on the succession to property of said decedent found in Ohio—

Held: That all real estate belonging to the decedent located in Ohio, together with the business carried on by him, including the machinery and equipment, book accounts and bank account incident thereto; the private account of the decedent in a savings bank; and the Liberty bonds and stocks of Ohio corporations and corporations under the laws of states other than Ohio, found in his safety deposit box in Cincinnati, are all taxable under the inheritance laws of Ohio.

B. W. Gearheart, special counsel for the Attorney General's office.

S. G. Roettinger, for Prosecuting Attorney's office.

Bettinger, Schmitt & Kreis for the Ellerhorst estate.

LUEDERS, J.

This matter comes into this court upon the petition of the executrices of J. C. Ellerhorst, deceased, praying that for the determination of the inheritance tax due to the state of Ohio, the court adjudge that the intangible property mentioned in the petition and left by the deceased, to-wit, certain shares of stock, bonds, accounts receivable, and money on deposit within the state of Ohio, is not subject to the inheritance tax, and

praying that an order be made releasing the same to the petitioners, and for all other relief to which they may be entitled.

The facts presented to the court briefly are as follows:

J. C. Ellerhorst died on or about the 29th day of February, 1920, and at the time of his death was a *bona fide* resident of the city of Bellevue, Campbell county, Ky. No question has ever been raised as to whether or not he was a resident of another state than Ohio and this may be stated as a fact. It appears further that prior to his death the deceased was engaged in business in Cincinnati, Hamilton county, Ohio, and in connection with said business owned certain real estate; likewise he was the owner of the business himself, and owned certain machinery which was incident to said business. There is no question now before the court as to the taxability for the purpose of determining the inheritance tax of the items above referred to. All counsel in the case agree that the real estate in this state, the business and the machinery is all subject to the inheritance tax of Ohio, and this question is not now under consideration by this court.

However, the deceased also had prior to his death a safety deposit box in the Central Trust Company in the city of Cincinnati. After his death, when this box was opened by the proper county representatives, there was found certain shares of stock in Ohio corporations. All counsel in the estate, including the attorney general, prosecuting attorney and the counsel for the executrices agree that such stock is subject to the inheritance tax in Ohio, and the court does find accordingly. Further the deceased had a deposit in the Security Savings Bank & Trust Company of Cincinnati, Ohio, in the sum of \$2,731.00, which was an individual account and in no way connected with his business. As to the proper taxability of this item, the attorneys for the state and county do not agree with counsel for the estate and this is one of the matters now for consideration before this court.

Furthermore, in the safe deposit box referred to the deceased had \$6,500 in Liberty bonds, and counsel for the estate contend that this item is not taxable, while counsel for the state and

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county contend that it is, and this also is before the court for consideration.

In addition to the items mentioned the deceased had in the same deposit box a number of shares of stock in foreign corporations, some in the state of Michigan, some in Colorado, some in Arizona, and various states other than Ohio. It is the contention of the attorney for the deceased that inasmuch as he was a *bona fide* resident of the state of Kentucky at the time of his death, the *locus* of all the intangible property, that is to say specifically, all of the foreign stock the Liberty bonds, and the cash follow the domicile of the owner and that they are in fact located in Kentucky and consequently not subject to the inheritance tax laws of the state of Ohio, while counsel for the state and county contend that inasmuch as the items referred to, towit, the stocks, Liberty bonds, cash, etc., were actually found within the state of Ohio, after the death of the decedent, they should come under the inheritance tax laws of the state.

A further item is to the effect that deceased owned at the time of his death certain real estate situate in the city of Bellevue, Ky., but all counsel agree, and in this opinion the court agrees, that said real estate in Kentucky is not subject to any inheritance tax laws of the state of Ohio.

Arriving at its decision herein the court has carefully considered the inheritance tax laws of the states of Massachusetts, New York and Illinois particularly, as well as certain other states in the Union. The General Code of Ohio, Section 5332-2, the same being a part of the inheritance tax laws of this state, provides for a tax to be levied upon any property passing, in trust or otherwise, to or for the use of any person.

“* * * When the succession is by will or by the intestate laws of this state or another state or country to property *within this state* from a person who was not a resident of this state at the time of his death.” (The italicising is by the court.)

Another paragraph of Section 5331-3 of the General Code reads as follows:

“When predicated of tangible property being physically located within this state. When predicated of intangible property and the succession thereto is for any purpose subject to or governed by the law of this state.”

The court has considered the case which was decided in this court, namely in the matter of the *Estate of Elizabeth L. Speers*, 4 N. P., 238, in which Judge Ferris, in construing the collateral inheritance tax law, reading as follows:

“That all property within the jurisdiction of this state and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible, which shall pass by will or by the intestate laws of this state * * * shall be liable to a tax * * *,”

held that although Mrs. Speers died a resident of the state of Kentucky, the fact that she owned about \$80,000.00 in bonds and other securities, and that these bonds and securities were found in a bank in Ohio, rendered them taxable under the inheritance laws of the state of Ohio.

In the case of *Hoit v. Keegan*, 167 N. W. 521, the Supreme Court of the state of Iowa, held that although the deceased was a non-resident of the state, nevertheless inasmuch as he had a bank deposit within the state of Iowa, represented by the customary bank book, and that said book was in the possession of the deceased at the time of the death, the deposit was subject to the collateral inheritance laws of the state of Iowa.

The Federal court in the case of *Blackstone v. Miller*, 188 U. S. 189, found that the deceased was a resident of the state of Illinois but had on deposit in a bank in the state of New York a very large sum of money, and that although the whole succession had been taxed in Illinois, the state of the deceased's residence, nevertheless the right of the New York taxing authorities to levy such a tax was valid. Another New York case was that of *In Re Burr*, 16 N. Y. Misc. 89, in which the court held that [money] of a non-resident decedent in a bank within the state of New York were taxable in the following language:

“The principal upon which such property is taxable is that it is under the protection of our laws and should on that account

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pay a share of the expense of the government. The money in the savings bank was there drawing interest and protected by the laws of the state; among others that creating a banking department which department is carried on at great expense to the state and was enacted for the particular protection of depositors.”

A leading and important case and one in which the law is laid down with great clearness is that of *State v. Probate Court*, 150 N. W., 1094, in which the Supreme Court of Minnesota found that although the deceased was clearly a resident of Pennsylvania at the time of his death and left a will disposing of various property within the state of Minnesota, to-wit, real estate, shares of stock in corporations, and notes and book accounts, and the contention was made that the property had its *situs* in the state of Pennsylvania, which was the domicile of the deceased, and not in Minnesota, nevertheless it was subject to the inheritance tax of Minnesota. A part of the language of the court is as follows:

“It is usually true that the right to succeed to the ownership of the personal property of the decedent is governed by the law of the domicile of the decedent, and is subject to taxation at the place of such domicile. Yet if the one who succeeds to such ownership must invoke the law of another state before he can reduce such property to possession to secure the beneficial enjoyment thereof, it is generally, though not universally held that such other state also has power to exact a tax upon the privilege of taking over and securing the beneficial enjoyment of such property.

“It is said that bonds and commercial paper are nothing more than mere evidence of indebtedness and it has been held that they may be subjected to a succession tax by the state within whose jurisdiction they are found although neither the debtor nor the creditor are residents of such state. * * *

“The relator must invoke the law of Minnesota to obtain the possession and beneficial enjoyment of the property in question. This is true as to all the sorts of property here involved and we are of the opinion that the state has power to tax the right to succeed to the ownership thereof.”

Clearly this case has many points of analogy to the case at bar. The executrices are required to come into this state and

invoke Ohio Laws to obtain the possession and beneficial enjoyment of the property in question.

We find another New York case, being that of *In Re Estate of Romaine*, 127 N. Y., 80, in which the deceased was a resident of Virginia at the time of his death and further held a safety deposit box in a bank within the state of New York in which he kept various securities and evidences of indebtedness. A part of the language of the court is as follows:

“Where however, the money of a non-resident is invested in this state, as was done by Romaine with the bonds and mortgages in question, and in the deposit made by him in the savings bank or where the property of a non-resident is habitually kept even for safety in the state we think the taxes apply both in the letter and the spirit. Such property is within this state in every reasonable sense, receives the protection of its laws and has every advantage from government for the support of which taxes are made, that it would have if it belonged to a resident. We think that a fair construction of the act permits no distinction as to such property based solely upon the residence of such deceased owner.”

In *State v. Bunte*, 1733 S. W., 101, the doctrine is laid down by the St. Louis Court of Appeals, that a debt which is due a non-resident from a resident of Missouri, and shown by a promissory note is property within the state and as such it is taxable.

Before passing to another phase of this matter we wish to call attention to the fact that the word “succession” is the word that is used repeatedly throughout the statutes, and not the word “descent” or “devolution.” As to the question of foreign bonds, stock, etc., being property within the meaning of the Ohio statutes, we have to say that Section 5348-4 of the General Code of Ohio designates shares of stock in a corporation organized or existing under the laws of this state, and then goes on to refer to bonds, notes or other securities or assets. We find no limitation by reference or otherwise as to their character. The word “securities” is one of very broad and general meaning and certainly will be conceded to include all stocks and bonds of whatsoever character they may be. We

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find a part of the opinion of the court in the case of *Sayer v. Waghen*, 44 S. W., 909, reading as follows:

“The term ‘securities’ in its broadest sense embraces bonds, certificates of stock, and other evidence of debt or of property. The Encyclopoedic dictionary defines ‘securities’ to be an evidence of debt or property as a bond, certificate of stock or the like.”

We are of the opinion that clearly the term “securities” as used in the section of the General Code was intended and in fact does include stocks in a foreign corporation as well as any other kind of securities. It cannot be successfully contended that it does not include bonds or notes, because those terms are expressly used. Neither can it mean tangible property for it appears under a provision relating to intangible property. Nor can it mean shares of stock in a domestic corporation because those are referred to in another place in the statutes. The famous case of *Lee, Treasurer v. Struckis*, found in the 46 Ohio State, 143, holds that a resident of the state of Ohio, must list for taxation shares of stock in a foreign corporation even though he pays taxes on its capital in the state where the corporation is located. And on page 161 of the opinion we find the language of the court reading as follows:

“Whether shares of stockholders and the capital of the company constitute the same or different species of property has been the subject of much discussion in a great number of cases, but the weight of authority we believe to be in favor of the proposition that shares of stock constitute property distinct from the capital or property of the company. The interest of the stockholder entitled him to participate in the net profits in proportion to the number of his shares; to have a voice in the selection of officers to manage the business of the company in like proportion and upon its dissolution the right to his proportion of the property of the corporation that may remain after payment of its debts. This is a distinct independent interest or property, held by the stockholder like any other property that may belong to him; is under his full control, so that he may sell or hypothecate it.”

See also *Hubbard v. Brush*, 61 O. S., 252, and *Jones, Auditor v. Davis*, 35 O. S., 474.

After carefully considering all the authorities above referred to the court is of the opinion—

First, that all real estate in the state of Ohio is subject to the inheritance tax laws of Ohio; likewise, the business and machinery situate in this state; likewise the bank account found in this state in the name of the business owned by Ellerhorst; and all property of any kind whatsoever which was incident to said business. Further, the court does find that all Ohio securities found in the safe deposit box are taxable under the inheritance tax laws of this state, and likewise, the stock in the foreign corporation as set forth more fully in the schedule, and further, the Liberty bonds and all other securities which were found in the said safe deposit box in a bank in Cincinnati, Ohio.

The court does further find that the deposit of money which the deceased had in the Security Savings Bank & Trust Co. in the sum of \$2,731 was actually within this state and consequently taxable under the inheritance tax laws of Ohio.

For the sake of clearness the court repeats that with the sole exception of the real estate located in the city of Bellevue, Ky., all matters and things set forth in the petition of the executrices and further set forth in the schedules in this court are subject to the inheritance tax laws of the state of Ohio. An entry may be taken in accordance with this opinion.

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Hanak v. Industrial Commission.

**DISEASE RESULTING FROM DEFECTIVE APPLIANCES NOT
AN OCCUPATIONAL DISEASE.**

Common Pleas Court of Cuyahoga County.

PAUL HANAK v. THE INDUSTRIAL COMMISSION OF OHIO.

Decided, May 3, 1920.

Workmen's Compensation—Disease Developed by Breathing Acetylene Gas—Compensation Recoverable.

1. Where, in the operation of a factory disease is developed by defective appliances, it is not produced in a natural and ordinary way and does not fall within the category of occupational disease.
2. An employee who has suffered injury from the inhalation of acetylene gas, due to a defective hose connection, is entitled to compensation under the workmen's compensation act on the theory that his injury was due to an accident suffered in the due course of his employment.

Philmore J. Haber, for plaintiff.*R. A. Baskin*, Asst. County Prosecutor, for defendant.

Wood, Judge.

This cause came on for trial, a jury having been demanded by the plaintiff, and after the statement of counsel for both plaintiff and defendant, the defendant's counsel objected to the introduction of any testimony on the grounds that the allegations contained in plaintiff's petition, together with the opening statement of counsel for plaintiff, did not constitute an injury as contemplated by the workmen's compensation act of Ohio.

It was thereupon agreed that plaintiff should withdraw his demand for a jury, and in case the ruling on the objection to the introduction of testimony was adverse to defendant, that the case was then to be submitted to the court on the allegations of the petition and the statement of counsel for plaintiff.

The facts necessary for a determination of this case are as follows:

That plaintiff for several weeks prior to the 29th day of November, 1918, was employed by The F. B. Stearns Company; that said company was covered by industrial compensation; that prior to the 29th day of November, 1918, the hose connecting the acetylene gas tank with the burner became defective and that holes appeared in a number of places in said hose; that the condition of this hose was reported and repaired from time to time, yet more holes appeared; that plaintiff on or about Nov. 19th, 1918, became ill as a result of inhaling gas which escaped through the holes; that on or about the 29th day of November, 1918, plaintiff was forced to quit his employment as a result of being injured in the manner described.

Under the above facts was, the injury received by plaintiff an accidental injury embraced by the statutes of Ohio concerning workmen's compensation, and employer's liability insurance, or was the injury the result of an occupational disease and not embraced within the workmen's compensation statutes.

"A disease contracted in the natural and ordinary course of employment, by a person engaged in a particular calling or occupation, which disease from common experience is known to be a usual and customary incident to such calling or occupation is an 'occupational disease.'" *Industrial Commission v. Roth et al*, 98 O. S., 34.

"An accident is some happening that occurs by chance unexpectedly, and not in the usual cause of events, and might possibly be prevented by the exercise of due care and caution." 98 Ohio State, page 40.

Occupational diseases are incident to certain employments, and must be restricted to a disease that is not only incident to the employment, but must be the natural and ordinary result therefrom.

The development of a disease resulting from defective appliances in the operation of a factory could not be said to be an occupational disease for the reason that the condition of labor did not produce it in a natural and ordinary way.

The use of acetylene gas with proper appliances produces no ill effects on the operator, but like many other substances if

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used with defective appliances may and do produce deadly results.

If the F. B. Stearns Company had used proper appliances in operating this factory there would have been no accident by way of escaping gas and no injury to plaintiff.

We think the rule to be that if the injury was the result of defective appliances in the operation of the plant, it should be regarded as an accident and the employee injured should be compensated under the workmen's compensation act.

The objection to the introduction of testimony will be overruled with exceptions.

Finding on the merits of the case in favor of plaintiff. Exceptions. Motion for a new trial overruled with exceptions. Order and judgment to be entered of May 3rd, 1920.

DENIAL OF IMPAIRMENT OF EARNING CAPACITY GROUND FOR APPEAL

Common Pleas Court of Defiance County.

WILLIAM DIETRICK V. THE CROWELL-LUNDOFF-LITTLE CO.

Decided, April 30, 1920.

Workmen's Compensation—Construction of Section 1465-90—Relating to Appeal from Final Action by the Industrial Commission.

Appeal lies from a denial by the Industrial Commission of compensation for injuries on the ground that the earning capacity of the claimant is no longer impaired.

H. B. Mullholand, for plaintiff.

Day, Day & Wilkin, of Cleveland, for defendant.

HAY, J.

The question submitted to the court in this case arises upon a demurrer to the petition.

Plaintiff, in his petition, alleges, in substance among other things, that the defendant is a corporation duly organized under the laws of Ohio, with its principal place of business in the city of Cleveland; that on and prior to October 20th, 1917, plaintiff was regularly employed by the defendant in the city of Defiance, Ohio, and in the course of his employment received certain injuries described in the petition; that thereafter plaintiff was confined to his home and remained under the care of a physician for a considerable length of time and when discharged by his physician was and still is unable to continue his regular work on account of the weakness of his right shoulder and right elbow, which weaknesses are the result of said injuries; that at the time of receiving said injuries, plaintiff was receiving wages from the defendant at the rate of 35c an hour and working six days per week; that prior to receiving said injuries plaintiff was strong and healthy and able to perform manual labor of all kinds; that at and prior to said 20th day of October, 1917, defendant had duly elected to pay compensation direct to its injured employees as provided by Section 1465-69 of the General Code of Ohio, and the Industrial Commission of Ohio duly accepted said election to so pay said employees, and that the defendant did pay said plaintiff the amounts provided by law to be paid for a period of about 21 weeks; that thereafter plaintiff and defendant could not agree as to the amounts, if any, that should be paid by defendant to plaintiff, and the matter of the payment of further compensation was duly submitted to the Industrial Commission of Ohio, and such proceedings were had that said commission at various times ordered certain amounts to be paid to plaintiff by said defendant, and said defendant paid to plaintiff all the amounts so ordered to be paid up to and including May 7th, 1919.

That plaintiff made application and all necessary reports for payment of further compensation between the dates of May 7th, 1919, and November 1st, 1919, to said Industrial Commission of Ohio, and said Industrial Commission heard said application for payment of compensation between said dates on the

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31st day of December, 1919, and upon said hearing said commission ordered that further compensation be denied on the ground that plaintiff did not suffer an impairment in wages during said period—said cause being No. 54545, Section 22 on the docket of said Industrial Commission of Ohio.

That plaintiff did, during said period of May 7th, 1919, to November 1st, 1919, suffer an impairment of his wage and earning capacity and does now and will during his life suffer an impairment of his wage and earning capacity, all of which is the result of the injuries hereinbefore described, and that if his said shoulder and said elbow were well and in the condition that they were in before said injury, he would have received during said period from May 7, 1919, to November 1, 1919, at least \$15 a week more than he did receive and would now be receiving at least \$15 per week more than he is now receiving, and that his future earnings would be far in excess of what they will be, and would have received between said date of November 1, 1919, and the present date, at least \$15 per week more than he did receive; that plaintiff is now 31 years of age and is not prepared or qualified to do work other than manual labor.

Plaintiff prays that this court and a jury may determine his rights in the premises; that it be adjudicated by a jury in this court that he has an impairment of his earning capacity from an injury received while in the course of his employment by defendant, and that he be allowed compensation according to law and for such other relief as may be proper.

The defendant demurs to the petition on the ground that the same does not state facts sufficient to state a cause of action.

In support of its contention, the defendant cites Section 1465-90 of the General Code as found on pages 322 and 323 of Vol. 108 O. L. This section provides, in part, that:

“In case the final action of such commission denies the right of the claimant to participate at all or to continue to participate in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis

of the claimant's right, then the claimant, within thirty (30) days after the notice of the final action of such commission, may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted or in the common pleas court of the county wherein the contract of employment was made, in case where the injury occurs outside of the state of Ohio, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it."

The defendant contends that the petition in this case not only fails to show that claimant was denied further compensation on any of the grounds named in this statute, but shows affirmatively that further compensation was denied on another and different ground, to-wit, that plaintiff did not suffer impairment in wages after May 7, 1919; that the commission recognized and sustained plaintiff's right thereto and awarded him compensation covering a period of over a year and a half, but, by its last decision, refused further compensation upon the sole ground that the impairment of earning capacity resulting from the injury, had ceased. Defendant contends that the commission's refusal on this ground does not go to the basis of the claimant's right to continue to receive compensation.

Counsel for the defendant cites the case of *Snyder v. State Liability Board of Awards et al*, 94 O. S., 342, decided June 23, 1916. This decision seems to uphold the position taken by the defendant.

Since said decision, however, the section above referred to has been amended. This section of the General Code, as it stood at th time of the decision in the Snyder case (103 O. L., 88) did not provide the right of appeal in case of the final action of the Industrial Commission denying the right of the claimant *to continue to participate* in such fund on any of the grounds mentioned in such section.

Less than a year after the decision in the Snyder case, this statute was amended so that a denial of the claimant's right further to participate in the fund was made appealable on any ground going to the basis of claimant's right. (107 O. L., page 162.)

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Is it not reasonable to believe that this amendment to the act was passed by the Legislature to meet just such a condition as we find in this case? In the Snyder case the court had accepted jurisdiction and allowed the claimant's compensation for a time, then evidently found that his earning capacity was no longer impaired and denied him the right further to participate in the fund.

In the final paragraph of Judge Newman's opinion in the Snyder case, the court say:

"As we view the present case, plaintiff in error, in invoking the jurisdiction of the court of common pleas, sought to have that court review the amount allowed to him by the State Liability Board of Awards. His right to participate in the fund, as we have seen, had not been denied, and the denial of this right upon one or more of the grounds set out in the statute being a condition precedent to his right to appeal to the court of common pleas, that court was therefore without jurisdiction to act in the matter, and the court of appeals was correct in so finding."

It seems to us that the question for the court to decide in this case is, whether, under this section of the code as amended, the denial by the Industrial Commission of the claimant's right to further participate in the fund or receive compensation on the ground that there is no longer any impairment of claimant's earning capacity, goes to the basis of claimant's right and renders his case appealable.

It is conceded by counsel for defendant, that if the Industrial Commission had denied claimant the right to further participate in the fund on the ground that the injury was self-inflicted, or on the ground that the action did not arise in the course of claimant's employment, that he would have a right to appeal. But counsel contends that denial on the ground that claimant's earning capacity is no longer impaired, does not go to the basis of his claim. It seems to us that a denial on such ground strikes at the very foundation of plaintiff's claim to compensation; that an impairment of claimant's earning capacity is just as vital to his claim as either of the juris-

dictional facts conceded and plainly expressed in the statute. If such be not the case, then the Industrial Commission, by finding, no matter how monstrously unjust, that the plaintiff's earning capacity is not impaired, can debar the most worthy claimant from participating in this fund, either upon his original application to participate in it, or upon a later application to continue to participate in it. If this be the law, it is time that it was so determined and the General Assembly given an opportunity to change it.

The law expressly provides that this act shall be liberally construed to carry out the purposes and object for which it was passed, and we believe that in overruling this demurrer we will be so construing the law. We are of the opinion that the amendment to this act in 1917 was passed to meet the defect shown to exist in the law by the decision in the Snyder case. We believe the decision of the Cuyahoga county court of appeals, 30 O. C. A., 166, supports our position.

The demurrer will, therefore, be overruled, and exceptions noted and the defendant granted leave to plead further by May 22, 1920.

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Sullivan vs. Agricultural Society.

TITLE BY ADVERSE POSSESSION TO A RIGHT OF WAY.

Common Pleas Court of Columbiana County.

ANNIE SULLIVAN AND JOHN T. C. SULLIVAN V. COLUMBIANA
COUNTY AGRICULTURAL SOCIETY ET AL.*

Decided, September Term, 1918.

Right of Way for Use as Street—May be Acquired by Adverse Possession—Recitals of Deed—Actual Possession by Claimant Sufficient Notice to Prospective Purchaser—Conveyance by a Religious Society Without Authority of Court—Open to Attack by Member of Society Only.

1. The title and right of possession to a right of way may be acquired by adverse possession.
2. Where a part of a right of way is specifically described in a deed as appurtenant to the land conveyed, the grant is thereby limited to that part, although formerly a more extended right was attached as an appurtenance. Especially is this so when neither the necessity, nor the convenience of the latter longer exists.
3. Actual possession by an adverse claimant is notice to a prospective purchaser of such equitable title as the one in possession may prove to have.
4. The want of an order of court under Section 10051, General Code, authorizing a religious society to convey real estate can not be taken advantage of by a person not a member of the society. The transaction is at most voidable, subject to direct attack by those only who had a right to object at the time and upon grounds on account of which the order would probably have been denied.

*Affirmed by the Court of Appeals.

William H. Spence, for plaintiffs.

Billingsley, Moore & Van Fossan, for defendants.

DUNCAN, J.

Heard on motion for a new trial.

This is an ejectment case—tried to the court. Each party claims the right of possession of the land. The defendant, the

Columbiana County Agricultural Society, is in possession. The common source of title is Peter Young. The plaintiff, Annie Sullivan, owns a tract in the city of Lisbon 4.30 x 12.10 chains, upon which she resides. We will call this tract No. 1. While Peter Young owned this tract and resided upon it, April 11, 1872, he conveyed to the defendant another tract lying almost cornering it to the southwest. We will call this tract No. 2. The deed for this tract No. 2, following the description, contains these provisions:

“Excepting and reserving therefrom an avenue 33 feet wide off of and along the west side of the said lot or tract of land its entire length from north to south.

Also excepting and reserving therefrom a right of way 33 feet wide to the *grantors*, their heirs and assigns (as an appurtenance to the property upon which they now reside) along the south side from west to east of the aforesaid tract until a good street shall be made and opened up by the authorities of the village of New Lisbon, from the Fairfield road to connect with said avenue along the west side of said tract, when this right shall cease and be terminated.”

Afterwards, said Peter Young died, seized of tract No. 1, leaving a will by which he devised the same to certain of his relatives, who in 1889 conveyed it to J. L. Beilhart. In 1901, said Beilhart conveyed this tract with certain rights of way to the Spirit Fruit Society, an incorporated religious society, and this society by successive deeds conveyed the same to the plaintiff, together with a right of way therefrom “south to Prospect street.” This street begins about midway of the west side of the village tract No. 2, and runs thence to other streets leading down to the business center of the village. It had just recently been dedicated to public use.

The contention arises over the right of possession of the strip 33 feet wide north and south along the west side of tract No. 2, as a right of way; also along the south end thereof from east to west.

The plaintiff founds her claim upon the provisions of these conveyances. The defense as to the north and south strip is founded upon a written contract with said Beilhart, acting as

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the president of the Spirit Fruit Society, of May 11, 1901, of which the defendant thereupon took possession, and on March 18, 1913, received a deed therefor. The defense as to the east and west strip is founded upon the claim of adverse possession of the defendant for a period of twenty-one years and more.

The finding will be for the defendant.

1. As to the east and west strip. I am satisfied from the evidence that the defendant has been in possession of this for more than twenty-one years to the exclusion of the plaintiff and those through whom she claims, and hence, that the action therefor is barred by force of the provisions of Sec. 11219, G. C., as follows:

“An action to recover the title to or possession of real property, shall be brought within twenty-one years after the cause thereof accrued.”

Title and right of possession to a right of way, as well as a fee simple, may be acquired by adverse possession. *Stevens v. Shannon*, 6 C. C., 142, 3 Circ. Dec., 386; *Mott v. Toledo*, 17 C. C., 472, 7 Circ. Dec., 216.

2. No effective grant was ever made to the plaintiff either to the east and west strip or the part of the north and south strip south of Prospect street. The grant to the plaintiff can include nothing more than her grantor then possessed, and this rule must necessarily extend back to the court proceeding, wherein the Spirit Fruit Society was authorized to sell tract No. 1 and the “right of way of the aforesaid premises south to Prospect street” to Robert W. Lange, and the deed made to him thereunder, of date June 30, 1908, so limited the grant. This specification of the right of way was carried through all the deeds thence on up to the deed of John H. Hinchliffe and wife to the plaintiff where the grant is made with the “appurtenances” generally. This is sufficient ordinarily to carry all appurtenances without description. 4 Kent Com., 407; *Shields v. Titus*, 46 Ohio St., 528; *Pavey v. Vance*, 56 Ohio St., 162; but it does not have the effect to grant any appurtenances which the grantor did not have. The extent of the plaintiff’s title

in this respect is measured by the title of her grantor, John H. Hinchliffe. So that, if the "right of way from the aforesaid premises south to Prospect Street" was specified in the deeds leading up to Hinchliffe, the plaintiff's "right of way" is likewise limited. This part having been specified, the right as to the other part, though otherwise implied, is thereby terminated. "*Expressum facit cessare tacitum.*" Especially is this so when, as here, another claimant is in possession of the part in question, and another way out, more direct and convenient, is made available by the recent dedication of a new street.

3. The defendant was in possession of a part of this north and south right of way under a contract therefor with The Spirit Fruit Society for the purchase thereof, and the purchase price had been paid. This created an equity therein in favor of the defendant. The contract was executed. Nothing remained to be done except the formal part of making the deed, and now this has been done. This deed was made after the plaintiff's rights attached, but it does not affect the situation as it existed before she purchased. The defendant's possession was notice to her.

In *House v. Beatty*, 7 Ohio (pt. 2) 84, it is held that notorious and actual possession of land by one is notice to all of whatever rights he has. It is a fact to invite inquiry of anyone wishing to purchase. In *Kelley v. Stanbury*, 13 Ohio, 408, it is held that there can be no valid plea of *bona fide* purchaser where the lands purchased are in the actual possession of third parties. This possession is notice to all the world of their rights. Therefore, the purchaser of land in possession of a third person is chargeable with notice of the rights and equities of the one in possession. And in *McKinzie v. Perrill*, 15 Ohio St., 162, it is held that a purchaser of land in the actual possession of a third person is chargeable with the notice of any equitable title of the one in possession, whatever the same may prove to be. See also to the same effect, *Day, Williams & Co. v. Atlantic & G. W. Ry.*, 41 Ohio St., 392; *Jaeger v. Hardy*, 48 Ohio St., 335, and *Root v. Pennsylvania Co.*, 5 Dec., 315, 7 N. P., 337.

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Whether an order of court was necessary to authorize the Spirit Fruit Society to convey the premises, to my notion, matters little under the facts of this case. The statute providing for this, Sec. 10051, G. C., reads as follows:

“When a * * * religious society * * * desires to sell * * * any real estate owned by it, * * * the trustees, wardens and vestry, or other officers intrusted with the management of the affairs of such society * * * or such society * * * itself, if it be incorporated under any law of this state, in the common pleas court of the county in which the real estate is situated may file a petition stating how and by whom the title thereto is held, that such society or association desires to make the sale * * * and setting forth the object thereof. If upon the hearing of the case it appears that such sale * * * is desired by the members of the society * * * and that it is right and proper that authority be given to accomplish it, the court may authorize the trustees or other officers of the society * * * or if incorporated the society * * * itself, to sell * * * such real estate in accordance with the prayer of the petition and upon such terms as the court deems reasonable.”

It will be observed that there is no prohibition, words of command nor condition precedent expressed in the statute which requires a holding that this method must be followed in order to convey a good title. By its provisions, if “it appears that such sale * * * is desired by the members of the society * * * and that it is right and proper that authority be given to accomplish it, the court may authorize” it. Who could be heard in an action to set it aside? Certainly not a stranger. And if a member of the society, other party in interest or the state should petition, would the court set the transaction aside, if it appeared that at the time of the transaction the sale was “desired by he members of the society and was right and proper,” under the circumstances then existing? As showing that the transaction is nothing more than voidable in any case, notice the reading of Sec. 10055, G. C., as follows:

“When the trustees or other officers mentioned in the preceding sections heretofore have sold and conveyed by deed in

fee simple * * * any real estate therein mentioned, without proceeding as required by such sections, and the grantees thereof and their successors in line of title, for five years since the date of such conveyance, held continued, exclusive, notorious and adverse possession of the real estate so conveyed, such sales * * * shall have the same validity and effect as if they had ben made by proceedings instituted under such sections and duly confirmed by the court of common pleas.”

This section merely confirms and makes absolute any conveyance of real property of a religious society not authorized by order of court, where the purchaser has “held continued, exclusive, notorious and adverse possession” thereof for five years since the date of his conveyance. In other words, it is a statute of limitations within which an action may be brought by an interested party to contest the right on the facts upon which the court might have made the order in the first place under said Sec. 10051. If then the transaction is *voidable* only, and not void, it must stand until successfully questioned in a direct attack by some one who had a right to be heard at the time it was made.

It therefore follows that the plaintiff does not own or have the right of possession of that part of the north and south strip south of Prospect street, nor that part thereof north of Prospect street described in the contract of May 11, 1901, actually occupied by the defendant. The defendant is not in possession of any other part of the land described in the petition.

The defendant John T. C. Sullivan is interested in this controversy only as the husband of the plaintiff, Annie Sullivan. D. Carl Scott was afterwards made a defendant as recorder of this county. The deed of March 18, 1913, from the Spirit Fruit Society to the defendant had been left with him for record and he was enjoined from recording the same until further order. This temporary injunction will be dissolved. The motion for new trial if one is filed will be overruled and judgment entered in favor of the defendants for their costs herein.

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Smith v. Power Co.

**USE OF STREETS FOR POLES AND WIRES CARRYING
HIGH VOLTAGE CURRENT.**

Common Pleas Court of Crawford County.

JAMES M. SMITH v. THE CENTRAL POWER CO.

Decided, 1920.

*Abutting Owners—Rights of in Street not Invaded—By Poles and
Wires Primarily for Street Lighting Purposes.*

Additional cross-arms and wires, placed on poles standing between the curb and sidewalk for the purpose of carrying a high voltage current for street lighting and other uses, do not constitute an invasion of the rights of abutting owners or an additional burden upon their property, where the cross-arms do not overhang the land of adjoining owners and the lines are being placed by a company having a franchise for the purpose contemplated.

W. C. Beer and E. J. Myers for plaintiff.

Frank Dore and Charles Gallinger for defendant. .

WRIGHT, J.

The defendant has constructed and is constructing a high voltage electric line along Southern avenue in this city in front of property of the plaintiff and others who have brought similar suits to restrain further construction and for an order for the removal of that part already constructed. Poles are erected at intervals set between the sidewalk and curb on the side of the street adjoining the property of the plaintiff and others, with cross arms supporting transmission wires. No part of the cross arms or wires extend over the street line or hang over the land of any of the plaintiffs. The plaintiff claims that this is an invasion of his property rights, that he has not been compensated therefore nor has given his consent to the erection of the

*Affirmed by the Court of Appeals on authority of *Hus v. Railway Light & Power Co.*, 25 C.C.(N.S.), 44.

poles and equipment. The defendant claims that it received a franchise from the city of Bucyrus to use the streets for this purpose; that it has a contract for lighting the streets of the city and that the pole, appliances and current conveyed over the same on Southern avenue will be used for the purpose of lighting that street and other streets in the city.

It is well understood that a property owner has a right or property interest in the street in front of his land, but just when that interest ceases or is subservient to the rights of the public has resulted in many conflicting decisions in the courts.

The title to the street is not absolutely in the municipality. It is a determinable fee. The city has the fee only in trust for street purposes: when the street purposes of the city end, then the property owner's rights begin, and any infringement on these rights is a taking of private property, for which compensation must first be made. The courts have endeavored to determine when the rights of an adjoining owner are taken by stating that any additional burden upon the fee is an infringement of those rights, and before such additional burden can be placed, the property owner's consent must be obtained. The defendant claims that the erection of these poles and the transmission of electric current is for street purposes, for lighting the streets of the city. This would unquestionably be a street purpose within the meaning of that phrase. If the defendant has shown this by the evidence, it is decisive of the case without considering the numerous conflicting authorities upon the rights of a property owner as against the rights of public utilities who use the street for private purposes, although serving the public generally, such as telephone companies, steam heating companies, etc.

The evidence showed the current furnished by the defendant is to be used for all purposes, including lighting the streets of the city; the defendant claimed that the line in question was a part of a main line running through the city to Upper Sandusky and Carey and that the furnishing of current to this city was only one of its objects.

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The engineer of defendant stated that if the line went through to Carey or some other point it would be for the purpose of completing another circuit, enabling current to be brought into the city from the west as well as the east side, thus doubling the assurance of continuous and ample service. I can see no difference or distinction so far as the rights of the property owners are concerned, whether it goes on through the city or whether the current is made within the corporate limits and distributed therein.

The claim is made that the line being a high voltage or main line, it requires longer poles, more wires than would be used for a distributing line for street lighting. The testimony of the defendant was that the same poles would be used for the distributing line, only additional wires would be placed upon them. Will the additional cross arms and additional wires on the poles in question place an additional burden upon the street? To say that it would, would be drawing the line to a very fine point. My opinion is that it would not. I can illustrate it by referring to the sewers in the city streets. A sewer is permitted to be placed in the street on the theory that it drains water off of the street and to that extent is used for street purposes. Legally a sewer could not be placed in a street, were it not for that street purpose which it serves; yet the same sewer is used for private purposes, for sanitary drainage of all modern homes along the street, which is in reality its larger purpose or function, and not the drainage of the street which is incidental; yet it would hardly be claimed that because it serves a double purpose that makes it an additional burden upon the fee.

I am unable to see that any added servitude is placed upon the fee by placing a longer pole with three or four more wires than would ordinarily be used for the transmission of current for only lighting the streets. The fact of such equipment being there would be the real invasion, if it is an invasion, and not the number or quantity of wires and cross arms, inasmuch as such equipment would not interfere with the property owner's enjoyment of light and air or ingress and egress.

Outside of ingress and egress, light, air and peaceable enjoyment of his property, the incorporal rights of an adjoining owner in the street are more theoretical than real.

The plaintiff in this case and other plaintiffs in similar suits have testified that the presence of the line in the street has depreciated the value of his property. Whether this is true or only fanciful, we do not know. People generally would prefer not to have such a line in front of their property. This is probably caused by the supposed dangerous agency of electricity. If people along all the roads and all the streets were of this notion, we could not have the modern method of electric lighting.

Evidence was given by experts that the high voltage wire was not as dangerous as the lower voltage or distributing lines. The depreciation of the value of property from the danger of high voltage lines is more imaginary than real, if we accept as true the expert's opinion. There is undoubtedly a dangerous agency present in the use of electricity, more than there would be in the use of kerosene lamp or gas light. There is also a more dangerous agency present in the use of automobiles over the streets at the rate of speed they travel than there was in the use of the slow moving ox-cart, yet we do not displace the modern way for the antiquated method, on account of the increase danger attending it, nor can property owners object to the use of the street in this way by reason of the danger.

There may be some inconvenience suffered by property owners by reason of such a line in front of their property; but there is no measurable damage suffered unless ingress or egress, light, air, etc., is cut off. If a pole were set in front of a drive way, it would have to be removed or adequate damage paid. To set a pole in front of an imaginary driveway, or one that might be established in the future, is not a present damage or loss.

It is claimed that the General Code requires such transmission wires to be insulated or covered; the defendant claims insulation of high voltage wires is impracticable and is not a safeguard. If the code is to be construed as requiring wires to be insulated then the law would be a reason for requiring the

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defendant to insulate its wires, and not a reason for tearing them down.

It is contended also that the defendant as assignee of the present lighting contract for the Bucyrus Light and Power Company has no authority under the assigned contract for the reason that it has not been shown the city consented to such assignment. The defendant has a franchise, as shown in evidence, to use the streets for its poles and wires, and a contract for lighting beginning December 15, 1919. Its contract and franchises with the city for future lighting would be sufficient even though the present contract is incomplete by reason of the city not consenting to its assignment.

It having been shown that the defendant is to use the poles, wires and equipment for lighting the streets and public places of the city of Bucyrus, such use of Southern avenue for street purposes is superior to the rights or easement in the street by an adjoining owner and there is no invasion or taking of his property interests. This conclusion is supported by the following authorities: 25 C. C. (N. S.), 44; 66 O. S., 166; Curtis on Electricity, Sec. 281.

The case of *Mantel v. Bucyrus Telephone Co.*, 20 C. C., 345, decided by the circuit court of this county, is not applicable for the reason that the pole and equipment enjoined from being placed in front of a business place was not to be used for street purposes but wholly for private purposes.

The case of *Hays v. Columbiana Telephone Co.*, decided by the circuit court of Columbiana county in 1901, a year after the Mantel case was decided is in direct conflict with the Mantel case.

The case of *Stone v. Cuyahoga Light Co.*, decided by the Cuyahoga Common Pleas Court in 1909, 9 N.P.(N.S.), 545, contains the better reasoning in cases where the streets are taken for private purposes.

**DETERMINATION AS TO THE TIME TO WHICH THE WORDS "IN
CASE OF DEATH WITHOUT ISSUE" REFER.**

Court of Common Pleas of Clark County.

JOHN H. CAVANAUGH V. CHARLES REXER ET AL.*

Decided, April 5, 1920.

Wills—Life Estate Created—Property to Then Go to a Designated Person—But in Case of Death Without Issue Then to Certain Heirs—Action to Quiet the Title to Said Property.

Where a testatrix by her will devises real estate to A for life and afterwards to B in fee simple, but in case of the death of B without issue to the next of kin of the testatrix, the words "in case of death without issue" refer to the death of B without issue during the lifetime of A, and if B survives A her title becomes absolute in fee simple, unless a contrary intent is evinced by the language of the will.

A. C. Link, for plaintiff.

Hamilton Bros., J. E. West, V. G. Hahn, for defendants.

GEIGER, J.

This is an action to quiet the title of the plaintiff to the north half of Lot No. 39 in Demint's addition to the city of Springfield.

The case is submitted to the court upon an agreed statement of fact, from which it appears, among other things, that plaintiff acquired his title by two deeds, one a tax deed and the other a quit claim deed from Jennie A. Dudley; that Jennie A. Dudley was formerly Martha Jane Ann Hurth and that she acquired her title by virtue of the last will and testament of Jane Hardy. The said Jennie A. Dudley was a daughter of Nancy Hurth, who was mentioned in the will as the niece of Jane Hardy; that Jane Hardy died in 1863 leaving no issue and leaving as

*Affirmed by the Court of Appeals, May 28, 1920.

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her nearest heirs and next of kin her brothers and sisters and said niece, Nancy Hurth, and the daughter of said niece, the grantor in said quit claim deed; that at the death of the testatrix said Martha Jane Ann Hurth was about three years old; that Nancy Hurth, niece of said Jane Hardy and mother of Martha Jane Ann Hurth survived the said testatrix and died about twenty-five years ago; that Martha Jane Ann Hurth is still living at the age of about sixty years. She had issue, one son, who died in 1882; that there is no probability of her having any other issue.

The question calls for the proper construction of the will of Jane Hardy and involves the construction of Items 2, 3, 4 and 5, which are as follows:

“Item 2. I devise all my real and personal property in trust for the sole use, benefit and behoof of my niece Nancy Hurth for her lifetime and after her death to the daughter of said Nancy Hurth, the name of said daughter being Martha Jane Ann Hurth, in fee simple.

“Item 3. I hereby name Elam Kinney as trustee to carry out the trust set forth in the last item.

“Item 4. The devise to my niece in trust in Item 2 is understood to be without the power of disposition on her part, or the power to charge the property with debt.

“Item 5. In case of the death of Martha Jane Ann Hurth without issue, I devise the property aforesaid to my next of kin to be distributed according to law.”

The claim of the plaintiff is that when Martha Jane Ann Hurth survived her mother, the life tenant, the title became absolute in her.

The claim of the defendant is that Martha Jane Ann Hurth, under the will, takes the fee simple title subject to be determined by the contingency of dying without issue at the time of her death and that if she should so die without issue, the estate would pass over to the surviving heirs of the testatrix by way of executory devise.

The rule is well established in Ohio that where there is a devise in fee to A, but if he die without issue then to B in

fee, the words "if he die without issue" are to be interpreted according to their popular meaning and have reference to the time of the death of A, unless the contrary intention is plainly expressed in the will or is necessary to carry out its undoubted purpose; and if A have no children or issue living at the time he dies, B takes under such devise; that A would take an estate in fee simple subject, however, to be determined by the contingency of his dying without issue living at the time of his death, on the happening of which the estate would pass over by way of executory devise. *Parish v. Ferris*, 6 O. S., 563; *Niles v. Gray*, 12 O. S., 320; *Taylor v. Foster*, 17 O. S., 166; *Smith v. Hankins*, 27 O. S., 371; *Piatt v. Sinton*, 37 O. S., 353; *Durfee v. MacNeil*, 58 O. S., 238; *Anderson v. Realty Co.*, 19 C. C. Dec., 267.

Is a contrary intention plainly expressed in the will or necessary to carry out its undoubted purpose?

By the will the estate is devised to the niece of the testatrix for her lifetime and after her death to her daughter in fee, with the provision that in the case of the death of the daughter without issue the property is devised to the next of kin of the testatrix.

Does the intervention of the life estate of Nancy, the mother of Martha, distinguish the case from the above cited cases?

In none of the cases above cited except *Niles v. Gray*, are the devises subject to a life estate. In each of the others it is the condition of the will that if the primary devisee shall die without issue the estate shall pass over.

In the first of the cases above cited the contention was that the words used referred in general to an indefinite failure of issue, which would create an estate tail and the court refused to adopt this English rule as the law of Ohio.

In the case of *Sinton v. Boyd*, 19 O. S., 30, it is held that in the construction of wills words of survivorship shall be referred to the period appointed by the will for the payment or distribution of the subject matter of the gift, unless a contrary intention is evinced by the language of the will.

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This court in the case of *Wood, Admr., v. Wood*, 22 N. P. (N. S.), 302, held:

“Where a testator bequeathes his property to his wife during her life, with the provision that after her death it shall be divided among his children and in the event of the death of any of the children without issue or heirs their share shall revert to the surviving heirs of the testator to be divided equally among them, the intervention of the life estate fixes survivorship as of the time of the distribution and after the termination of the life estate.”

The court in that case relied strongly upon the cases of *Miller v. Miller*, 10 O. N. P. (N. S.), 630, affirmed by the Supreme Court without report, 88 O. S., 563, and *Pendleton v. Bowler*, 11 Ohio Dec. Rep., 551, 27 W. L. B., 313, affirmed without report, 54 O. S., 654.

It appears to the court that the evident intention of the testatrix under this will was to give to her niece the life estate in the property, with the provision that it should go upon her death to her daughter, provided she be living at the time of the death of the mother, but that if the daughter should die without issue prior to the death of her mother, then the estate was to go to the next of kin of the testatrix to be distributed according to law.

There are two rules of law which further fortify this view—one that where an estate in fee simple is once given language cutting it down must be equally clear, and the other that a construction which ties up an estate is not favored. It can hardly be conceived that the testatrix intended, after having given an estate in fee simple to her grand niece, who was then about three years of age, that it should be tied up without power of alienation in fee until it should be determined whether the grand niece should ultimately die without issue. The evident intention of the testatrix was to give a life estate to her niece without power of disposition and under the control of a trustee and that if during such life estate the grand niece should die without issue, the heirs at law should take the estate, but that

if her grand niece should be living at the time of the death of her niece that she should take the estate in fee simple absolute.

It would be a work of supererogation to comment at length upon the cases which lead to this conclusion as they are so well collated and commented upon in the two cases above referred to, viz: *Miller v. Miller* and *Pendleton v. Bowler*, both of which were affirmed by the Supreme Court. The court endorses and relies upon the reasoning of these cases.

The plaintiff in this case having derived his title by quit claim from the grand niece, Jennie A. Dudley (designated in the will as Martha Jane Ann Hurth), acquired by such deed a fee simple absolute title to the real estate and the title should be quieted as against the other heirs of the testatrix, Jane Hardy.

Judgment accordingly.

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In re W. C. Reilly.

**INVALIDITY OF THE CLEVELAND ORDINANCE RELATING TO
EMPLOYMENT OF GUARDS DURING INDUSTRIAL
DISTURBANCES.**

Common Pleas Court of Cuyahoga County.

IN RE W. C. REILLY.

Decided, November 20, 1919.

Strikes—Invalid Restrictions on Employment of Guards—Cleveland Ordinance in Violation of Constitutional Guaranties.

The Cleveland ordinance, forbidding the employment of guards during industrial disturbances except under the restrictions set forth in the opinion, is in violation of rights which are fundamental and inalienable and which can not be abridged, or made difficult or impossible of exercise by the notions or opinions of a municipal director of public safety.

STEVENS, J.

W. C. Reilly is under sentence of the Municipal Court to pay a fine of \$25 and to be imprisoned in the workhouse for thirty days. To obtain release from imprisonment he brings this proceeding in *habeas corpus*, claiming that the ordinance under which he was sentenced is invalid, and that his imprisonment is therefore unlawful. If his claim in this respect is well founded, his right to be so released is clear.

Reilly was found guilty in the Municipal Court of violating ordinance No. 50140. This ordinance attempts to make it unlawful for any person to act as a special guard during industrial disturbances or strikes, unless he has first furnished to the director of public safety "such information as the director may require," and has given bond in the sum of \$1,000, conditioned as is the bond of a regular police officer.

An analysis of the provisions of this ordinance, and a brief consideration of the nature and bearing of these provisions, will, in my opinion, make obvious the proper disposition of this case.

Section 1 of the ordinance forbids any person, firm or corporation from employing any person as a special guard "dur-

ing any industrial disturbance or strike," unless such person "shall first have been empowered to act as such special guard by the director of public safety."

Section 4 defines a special guard as any person, other than a policeman, "acting as protector of property or in any police capacity."

By sections 2 and 3, any person desiring to act as such special guard must make application for that privilege to the director of public safety, furnishing the director with such information as he, the director, "may require." The ordinance is silent as to the character of information which the director may require, and neglects to provide that the director is *required* to authorize one to be a special guard if all *requirements* as to information have been met. A person "empowered" to act, as special guard, must give bond of \$1,000, approved by the director, having the same conditions as the bond of a regular policeman, and such person "shall be directly responsible to and under the orders of the chief of police of the city of Cleveland."

If such person has not resided six months in the city of Cleveland, and "fails to file satisfactory recommendations with the director of public safety, from the police department of the city of his last residence," his description and finger prints "shall be forwarded to the police department of the place of last residence, and no action shall be taken by the director of public safety upon his application until *satisfactory* information from said police department is received." Any person who fails "to conform to any of these requirements shall be fined not less than \$25 nor more than \$100, or imprisonment not more than thirty days, or both."

What is the meaning of this ordinance, when we consider the possible and probable effects of its application?

It forbids the employment of guards "during any industrial disturbance or strike." It does not forbid such employment during times of industrial quietude. In other words, guards may not be employed at the very time when there is a possible menace to property or personal safety. Guards may be employed at any time excepting when they may be needed. The

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ordinance does not define "industrial disturbance" or "strike." How general must be the "disturbance" to make the ordinance applicable? So far as the language of the ordinance is concerned, if there is any industrial disturbance or strike *anywhere*, no one in the city may employ a guard, that is—"a protector of property."

Who is the director of public safety, that he may "require" information from persons acting as guards of private property? The ordinance does not specify what information he may "require." Under the ordinance he might "require" any kind of information which his fancy or his predilections or his sympathies suggested. After he has received all the information that he requires, there is no provision in the ordinance that he *shall* empower persons to serve as guards. He may grant or refuse the privilege as he sees fit. No matter how great may be the necessity for the protection of private property, the director of public safety would be acting entirely within the terms of the ordinance if he refused to "empower" special guards.

The ordinance says that a special guard is "any person acting as a protector of property." I doubt if a statute or ordinance similar to this has ever before been enacted in the United States. The protection of property has not, heretofore, been regarded as an activity so offensive in its nature as to require stringent regulation. The assumption heretofore has been that any one was acting entirely within his fundamental rights when he sought, without let or hindrance, from any one, to protect his property. A complete development of the idea embodied in this ordinance would suggest an amendment making it unlawful for any person to employ a guard to protect his life, or the lives of members of his family. The menace to public safety which inheres in the universal instinct of self-defense would thus be removed.

In support of the claim that the ordinance is valid, there is cited the case of *State of Ohio v. Hogan*, 63 O. S., 202. This case upheld the constitutionality of a law punishing a *tramp* who is found carrying a firearm. The Supreme Court held it proper to forbid tramps from carrying firearms. The tramp, it said, is a menace to society. "He is numerous, and he is

dangerous. He is a nomad, a wanderer on the face of the earth, with his hand against every honest man, woman and child, in so far as they do not promptly and fully supply his demands."

To apply the reasoning and rule of the Supreme Court to this case, we must place the tramp and the one who seeks to protect his own property in the same odious class. It can not be done.

This is not a concealed-weapon ordinance, but one is justified even in carrying a concealed weapon if, in the language of Section 13693, General Code, "he was, at the time, engaged in a lawful business, calling or employment, and the circumstances in which he was placed justified a prudent man in carrying such weapon for the defense of his person, property or family."

By Section 4 of Article I, of the Constitution of Ohio, "The people have the right to bear arms for their defense and security."

Sec. 1 of the Bill of Rights declares that "All men have certain inalienable rights, among which are those of defending life and protecting property."

These rights are inalienable, and fundamental, and can not be abridged or restricted by a city council, or made difficult or impossible of exercise in accordance with the notions or opinions of a municipal director of public safety.

This ordinance is so manifestly invalid and unconstitutional that none of the extremest presumptions as to the validity of legislation enactments can serve to redeem any phase of it.

The writ is allowed, and the petitioner is discharged.

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Voelker vs. Arras.

**LIABILITY OF REMOTE TRANSFEREE OF AN INVALID
PROMISSORY NOTE.**

Court of Common Pleas of Richland County.

J. C. VOELKER V. JOHN A. ARRAS.*

Decided, June 5, 1919.

Promissory Note—Executed for an Invalid Consideration—Action Against the Vendor—Warranty Embodied in a Qualified Endorsement with Delivery—Nature of Action Brought by Subsequent Owner—Estoppel—Presumption—Liability Without Notice of Dishonor and Demand for Payment.

1. A promissory note and a mortgage executed and delivered to secure the payment of the same, given by a third party to suppress a criminal prosecution on the charge of embezzlement of funds by an employee, are both void, and no action can be predicated on either the note or the mortgage.
2. The vendor of a promissory note by delivery and qualified endorsement, notwithstanding such indorsement, "without recourse on me," after due, for value, warrants, among other things, that the note is founded on a valid consideration, and this warranty extends to a remote transferee of the note, Section 8143 and 8170 G. C.
3. In such case a subsequent owner and holder of the note for value can maintain an action for the amount paid by him for the note with interest thereon from the date of its purchase, on the breach of the warranty, against the original payee who endorsed the note, provided the owner and holder thereof has no knowledge of the invalidity of the consideration, at, on, or before the purchase of the same, and provided further, he is unable to enforce collection of the note from the maker by reason of the invalidity of the consideration of the note, and provided further the immediate indorsee is execution proof.
4. In such case the action is not technically an action on the note, but an action for damages on the breach of the warranty in the indorsement by the endorser as a vendor of the note, for that the note is not what it purports to be, a valid obligation of the maker.
5. In such action the payee and endorser is estopped to set up a claim or claim his want of knowledge of the invalidity of the consideration of the note and mortgage, for he had knowledge of the fact which impaired the validity of the instrument, Section 8170 General Code.

*Affirmed by the Court of Appeals without report, September 5, 1919.

6. The fact that a party purchased a promissory note after the same is due, in and of itself raises no legal presumption against him that he knew the invalidity of the consideration.
7. If a promissory note is void for illegality of consideration, the indorser is liable without notice of dishonor and demand for payment on the maker.

Statement of counsel:

The note involved in the case was in the following words and figures:

"Mansfield, Ohio, Dec. 12, 1913.

"\$560.00

"One year after date, without grace, we jointly and severally as principal debtors promise to pay to John A. Arras or order Five Hundred and sixty dollars with interest payable semi-annually at six per cent.

"(Also containing regular cognovit power.)

"(Signed) Joseph Frederick Kibler,

"Mary Kibler.

"This note secured by mortgage."

The note bears the following indorsements:

"'J. A. Arras without recourse to me.' June 17th, 1915.

"'J. A. Jacob, without recourse to me.' Sept. 25, 1916."

Prior to the present suit the plaintiff herein had brought suit against the makers of the mortgage to obtain possession of the premises described in the mortgage under the terms of the mortgage, the same having been transferred from and to the parties named in the endorsements on the note on the dates of the transfer of the note. The plaintiff had failed in this suit, for the reason that the mortgage was given to secure the payment of a note based upon an illegal consideration.

The plaintiff in the present case recovered a verdict and judgment against the defendant in the trial court for the amount paid by him for the note together with interest thereon from the date of its purchase by him, and this judgment was affirmed by the Richland Court of Appeals, Sept. 5, 1919, without report, said court finding and holding this charge of the trial court to be in all respects a correct statement of the law.

C. H. Workman and Geo. A. McGrath, for plaintiff.

C. E. McBride and J. P. Seward, contra.

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Voelker vs. Arrars.

CHARGE TO THE JURY.

By Judge J. W. Galbraith.

Gentlemen of the jury:

In this action the plaintiff seeks to recover \$750 damages from the defendant as the vendor or seller of a note, secured by a mortgage, which plaintiff alleges had been executed and given to defendant for an illegal consideration and which was therefore void and of no value, which fact it is alleged the defendant knew when he sold same, but of which plaintiff had no knowledge at the time of his purchase of said note and mortgage.

The pleadings in this case—the petition and answer—containing allegations many of which are admitted, or not in dispute, and some which require no denial, I will not read to you, but will separate and present to you the material matters which are in dispute and which are for your determination.

These pleadings, however, you will have with you in your retirement. You are at liberty to refer to them to refresh your minds upon the claims and contentions of the parties, but they are not to be considered as evidence, simply because they are sworn to, nor for any other purpose than to discover the assertion of the respective claims of the parties.

Strictly, or technically, speaking this action is not one upon the written instrument itself but is one to recover damages in an amount *alleged* to have been paid for such note by the plaintiff, and interest thereon, because of its alleged want of value.

It is the statutory law of this state that *every person negotiating, or selling, a note* such as is referred to in this action, by what is called a qualified endorsement—"without recourse to me"—such as is alleged and admitted by the pleadings in this action, warrants as fully as though it was specifically set forth with his endorsement that he has no knowledge of any fact, which would impair the validity of the instrument or render it valueless.

It is alleged in the petition that said note and mortgage was given by Joseph Frederick Kibler and Mary Kibler to the de-

fendant J..A. Arras, to suppress a criminal prosecution against their son—LeRoy Kibler, and it is admitted by the answer that the consideration of said note was the settlement of a criminal prosecution against said son.

I charge you as a matter of law that this statement that it was given to suppress, and the admission that it was given as the settlement, of a criminal prosecution, as plead, is one and the same thing; and, that such a consideration for a note is illegal, and a note given for such a purpose is void and uncollectible from its maker by legal proceedings.

It is also alleged in the petition and admitted by the answer that this defendant endorsed said note to one J. A. Jacobs, by the form and words "J. A. Arras without recourse to me" and at the same time transferred said mortgage to the said Jacobs.

These admitted facts, as well as any others which may have been admitted on this trial, require no evidence to establish but are to be taken as true.

The material facts which are alleged by plaintiff and denied by defendant, are as follows:

(1) That on or about September 25, 1916, the said J. A. Jacobs, for a valuable consideration, indorsed said note and transferred said mortgage to plaintiff by indorsement "J. A. Jacobs without recourse to me," and that plaintiff is now the owner and holder of said note and mortgage.

(2) That plaintiff was unaware of any illegality in the consideration of said note and mortgage at, on, or before, the date he became the owner thereof by endorsement from the said J. A. Jacobs, and was not aware thereof until after his purchase.

(3) That the principal and interest thereof has not been paid.

(4) That plaintiff is unable to collect from the makers on said note and mortgage because of the invalidity of the consideration.

(5) That said J. A. Jacobs has no property subject to execution from which plaintiff can recover.

(6) That by reason thereof plaintiff has sustained damages in the sum of \$750, or in some amount.

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And for proof of these facts which are alleged by plaintiff and denied by defendant the plaintiff assumes the burden of proof and must establish the same by a preponderance of the evidence before he is entitled to a verdict at your hands.

By a preponderance of the evidence is meant the greater weight—that which weighs more or is more convincing to your minds than all evidence to the contrary.

If the plaintiff has established all of such facts by such degree of proof then he is entitled to a verdict for the damages actually sustained by him by reason thereof.

If the plaintiff has failed to establish such facts by such degree of proof then your verdict should be for defendant.

As a matter of law you are instructed that the statutory warranty against defect in validity of consideration (from the manner the transfers are alleged to have been made in this case), would inure to the benefit of plaintiff against defendant as fully as to the immediate transferee of defendant—J. A. Jacobs—if you find from the evidence that the transfer from Jacobs to plaintiff was made as alleged in the petition, and at such time plaintiff had no notice or knowledge of the illegality of the consideration.

While indorsers are liable *prima facie* in the order in which they indorse and ordinarily plaintiff would first be compelled to pursue J. A. Jacobs the one who had endorsed and transferred said note to him; if you find from the evidence that the plaintiff has failed to do so, but that J. A. Jacobs has no property subject to execution, and that plaintiff could not effect a collection from him, even if he were to recover a judgment against him, then I charge you, as a matter of law, that plaintiff has a right to bring his action directly, and in the first instance, against defendant as a prior endorser.

A question is presented, in this case—one of the essential elements of plaintiff's right to recover, of his want of notice or knowledge of the invalidity of the consideration for such note and mortgage.

If plaintiff at or before the time of his alleged purchase of said note and mortgage knew that it was given in settlement of or to suppress a criminal prosecution then plaintiff can not recover in this case.

Knowledge of the infirmity in the consideration of said note on the part of Jacobs would not be notice or knowledge to charge this plaintiff, unless you find from the evidence that actual notice or such knowledge was brought to the attention of plaintiff at the time or before, he took such note and mortgage by endorsement and transfer and paid for the same whatever the consideration therefor was, if anything.

It is alleged by plaintiff that the note and mortgage in question was endorsed to the said J. A. Jacobs on or about June 17, 1915, and by him endorsed to plaintiff on or about Sept. 25, 1916; and the note shows on its face that it became due on Dec. 12, 1914—in other words both Jacob and plaintiff took said note after it became due.

It is the law that one who takes or purchases a note after it is due is not a holder in due course, and takes such note subject to any defenses which might be asserted *by the maker* against the payee, or the person to whom originally given; in other words *as to the maker of the note* the holder, in such case, is presumed to have knowledge of all defects in the note; but this legal presumption of said notice does not inure to the benefit of an endorser to relieve him from his liability to an endorsee on the warranty, of the statute, that the endorser's title to the note is good and that there is no invalidity of consideration.

The mere fact that the endorsee—plaintiff herein—become the purchaser, if he did, of the note a long time after the same was due would not raise a legal presumption against him that at the time of the purchase he knew the note was invalid; but the fact as to the date of his purchase would be a circumstance which may be taken into consideration with all the other evidence in the case to determine whether or not plaintiff, as an endorsee and purchaser, had notice, or should be chargeable with such knowledge.

On account of objections made to certain remarks in argument, in reference thereto, I again call your attention to an instruction of the court at the time of its admission of original files, as part of the record of the case in the Court of Common Pleas of Crawford county, Ohio—plaintiff's Exhibits A. B. D. and F.

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These exhibits were admitted, on behalf of plaintiff, only as tending to show an effort of plaintiff to realize against the makers—Kibler—on the mortgage security of this note here in controversy—the nature of the defense of the makers, in such action; and the result of such action; and the mere fact that the pleadings in such case were sworn to, do not make them evidence or proof in this case of the facts alleged in such pleadings, and you have no right to consider them or any other purpose than that for which they were permitted to be introduced as I have explained to you.

Upon the question of defendant's knowledge or notice of the infirmity in said note—the illegality of the consideration—I charge you as a matter of law that every person is charged with notice and knowledge of what by law he is supposed or required to know; and the purpose of the original giving of said note in settlement of a criminal prosecution being known by him, he is legally charged with notice of its invalidity on such ground and upon that point plaintiff was not required to make proof.

So, gentlemen of the jury, if by a preponderance of the evidence and under the rules of law which I have given you, you find that plaintiff is the owner and holder of the note in question; that he become such owner and holder for a valuable consideration from J. A. Jacobs; that at and before the time he became such owner and holder he had no notice or knowledge of the invalidity of its consideration; that the principal and interest called for in said note is unpaid; that because of such invalidity plaintiff is unable to collect the same from the makers of such note, and that J. A. Jacob, plaintiff's immediate endorser, is legally uncollectible; then plaintiff is entitled to a verdict at your hands against defendant for the damages sustained by plaintiff by reason of defendant's prior ownership, sale and endorsement of said note; and the measure of such damage would be the value of the consideration given or paid by plaintiff to said Jacobs for such note, together with interest on such amount from the date of plaintiff's purchase of such note to the first day of this term of court, which is April 7, 1919.

If, however, plaintiff has failed to establish, by a preponderance of the evidence, all or any one of such essential facts, then your verdict should be for defendant.

You are the sole judges of the facts, the credibility of the witnesses and the weight to be given to their testimony.

The law in this case you will take from the court, as given in these instructions.

When you find the facts, you will apply the facts so found to the instructions given.

In determining the credibility of the witnesses and the weight to be given to their testimony you will take into consideration their demeanor and manner on the witness stand; their interest, if any, in the controversy; the apparent truthfulness or untruthfulness of their stories; the reasonableness or unreasonableness of their testimony; their knowledge concerning the matters about which they testify; their bias or prejudice, if any is shown—take all these matters into consideration and give to the testimony of each witness such weight and such credit as you believe is fairly entitled to.

Two forms of verdict will be given you, to meet your possible conclusions.

If you find for plaintiff you will add interest to the amount found due him for the time I have mentioned and include same in your verdict.

If you find the issues against plaintiff you will simply return a general verdict for defendant.

At least three-fourths or nine of your number, must agree upon the verdict rendered and when you have so agreed your verdict should be signed by all of those agreeing and returned into court.

You may retire.

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Oldham v. Munitions Mfg. Co.

**ADEQUACY OF THE CONSIDERATION PAID BY A CORPORATION
TO A LICENSEE OR OWNER OF A SECRET
PROCESS.**

Common Pleas Court of Montgomery County.

**JACOB OLDHAM VS. THE MUNITIONS MANUFACTURING
COMPANY ET AL.**

Decided, August 5, 1920.

*Corporations—Right of Creditors to Recover Difference Between the
Actual and Alleged Inflated Value of Property—Purchased by a
Corporation with Fully Paid-up Stock.*

1. The allegation in the petition of a creditor of a corporation that the purchase by the board of directors of a patent right which had "no market value" and the utility of which had not been demonstrated but was "entirely speculative, uncertain and problematical," for which the consideration was fully paid-up shares of the defendant company, does not state a case of constructive fraud against the creditors of the company by the directors and stockholders thereof.
2. In such a case a court will not substitute their judgment as to the adequacy of the consideration for that of the contract of the parties, but will uphold the contract.

SNEDIKER, J.

This case for alleged unpaid stock subscription is before us ✓
on a general demurrer to the petition. The claims of the plaintiff disclose that he heretofore recovered a judgment against the defendant, the Munitions Manufacturing Company, and that upon an issuance of an execution on that judgment the execution was returned unsatisfied. The defendants other than the Munitions Manufacturing Company, were stockholders in that corporation, and it appears that before the organization thereof and before they subscribed for their shares in the company, one P. J. Mitten who was by assignment from the Alloy Products Company, the owner of the exclusive right as licensee in the United States of a secret process of alloy to manufacture fuses,

fuse parts, detonators and primers and the right to use machines and apparatus in the manufacture of the same and so forth, entered into an arrangement with the defendant stockholders whereby he agreed that if they would form a corporation and would subscribe for 110 shares of stock in that corporation and would pay the full par value of the stock by them so subscribed at the rate of one hundred dollars a share, and would cause the corporation to issue him \$117,000 stock fully paid up for the transfer by him to the corporation of his rights and interest as such licensee, he would, out of the stock received by him give them two shares of stock for each share they subscribed and paid for; and it appears that this arrangement was verbal and that there is no memorandum thereof on the records of the defendant corporation. Subsequently the corporation was organized and on April 24, 1916, at the first meeting of the stockholders Mitten made the proposition to sell to the company his property and right as such licensee "for the sum of \$117,000, payable in stock of your company, the same to be received in full payment of the subscription to the capital stock of your company heretofore made by me, said stock to be issued to me as fully paid."

We gather from this that before this offer was made by Mitten he had subscribed for \$117,000 stock. It appears that the stockholders resolved to accept Mitten's proposition, and they requested the board of directors to accept this offer and issue stock to him in accordance with his proposition. At the first meeting of the directors held on May first, 1916, Mitten's proposition was accepted and there was issued to him as a consideration for the assignment of his rights as licensee 1170 shares of the stock of the Munitions Manufacturing Company fully paid. It may here be interpolated that, whether the action of the stockholders recommending to the board of directors the contract with Mitten, which was subsequently made, was before or after the election and organization of the board, it may not be said to have been mandatory. The stockholders cannot control the board of directors in its management of the corporate affairs. The corporate powers, business and

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property of corporations must be exercised, conducted and controlled by the board of directors. Section 8660, General Code. 68 O. S., 442.

The claim of plaintiff with respect to this transaction is that the secret process, the right to which was transferred by Mitten to the company, had no market value, that its utility had not been demonstrated at the time of the sale and transfer and its utility for the purpose for which the company intended to use it had not been demonstrated, and further that its utility was then and still is wholly speculative, uncertain and problematical. There is found in the 57 O. S., page 60, the case of *Gates, Admr. vs. Tippecanoe Stone Co., et al.*, in which at page 78 Judge Bradbury lays down a rule which has since been followed in this state and has not by the Supreme Court been in any way modified. In speaking of the case before him Judge Bradbury says:

“This attempt by McLane and his associates to dispose of their property at a fictitious or inflated value to a corporation of their own creation * * * one designed and brought into existence chiefly for that purpose * * * should be regarded as a fraud upon subsequent creditors of the concern, although no evil intent accompanied the transaction, and the difference between the actual and inflated value of the property so conveyed should be deemed unpaid subscription upon the stock issued in this way whenever necessary to protect the rights of the corporate creditors.”

It will be observed from a careful reading of this excerpt that the holding of the Supreme Court is to the effect that if such a transaction is tainted by constructive fraud, that is by “such acts as, although not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet by their tendency to deceive or mislead other persons, deemed equally reprehensible without positive fraud”. the rule applies.

But in order that we may gather from this petition that these defendants have been guilty of constructive fraud, it is necessary for us to discover in its language that there has been

such a gross inadequacy of consideration that a court of equity will be moved to grant relief on that account. The allegations of the plaintiff are as heretofore quoted. The secret process as we have said is claimed to have been without market value and without demonstrated utility and its usefulness is declared to be speculative, uncertain and problematical. In the exercise of its powers under the law a board of directors acting for and on behalf of the corporation—and we must keep in mind that this was a contract between the board of directors and Mitten—saw fit to accept the process at the offer Mitten made.

The rule is that where parties agree upon a consideration and it is one of indeterminate value, the courts will not substitute their judgment for that of the contracting parties but will uphold the contract. 171 Ind., p 323, 343. It avails the plaintiff nothing that, after making the allegations he does with respect to the uncertainty of the value of the process in question, he subsequently says: "If the said contract for the use of said secret process might be said to have any actual value such value was not in excess of \$95,000." This is no more than his opinion with respect to an uncertainty which he has before declared and is an unwarranted conclusion of fact. The further complaint of the plaintiff that Mitten did not receive the stock which was afterwards transferred to the stockholders, in good faith as part of the consideration for the transfer to the corporation of his contract with the Alloys Products Company, but that the corporation issued the stock and Mitten received it for the purpose of transferring it to the defendant stockholders in pursuance of the agreement between them and Mitten, is not helpful to the plaintiff, for the reason that we are unable to find that there was an inadequacy of consideration. The agreement made by Mitten with these stockholders, prior to the organization of the company, was the agreement of Mitten and the individuals; and the corporation was in no way involved, unless it could be found from the allegations of the petition that it has not received adequate value.

In view of the foregoing we are constrained to find that this petition does not state a cause of action against these defendants. The demurrer is, therefore, sustained.

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Kramer v. Foundry Co.

INFORMAL DIVISION OF PROFITS TREATED AS A DIVIDEND.

Court of Common Pleas of Montgomery County.

JOSEPH KRAMER v. THE KRAMER BROTHERS FOUNDRY CO. ET AL.

Decided, December 18, 1918.

Corporations—Acquiescence of Stockholders in Informal Acts of the Directors Cures the Irregularity—Division of Profits to the Disadvantage of Certain Stockholders—Equivalent to Declaration of Dividend in which an Omitted Stockholder is Entitled to Participate—Corporation Estopped from Setting up Inequality of Division as a Defense to its Treatment as a Dividend—Customary Method of Transacting Corporate Business Binding.

1. A division of the profits of a corporation, informally agreed upon by the two chief stockholders owning practically all of the stock, will be construed as a declaration of a dividend.
2. Such a division of profits, acted upon by one of the stockholders to the disadvantage of the others, will be deemed a dividend, notwithstanding the fact that none of the statutory formalities surrounding the declaration of a dividend have been complied with.
3. The fact that there was no formal action by the directors and no setting aside of a specific amount or the declaration of a specified per cent., will not prevent such division of profits from being treated as a dividend.
4. Unanimous consent and acquiescence of the stockholders, acted on by the parties concerned to such an extent as to materially change their position, precludes the assenting stockholders as individuals and the corporation as such, from afterwards setting up legal informalities in matters of internal concern, affecting only the interests of the stockholders, to the overthrow of rights that have been acquired on the faith of the consent and acquiescence.
5. Where two directors of a corporation with the consent and acquiescence of the remaining directors and stockholders, make a division of the profits of a corporation other than *pro rata*, and such unequal division is acquiesced in by the remaining stockholders, the corporation will be estopped from setting up the inequality or failure to divide *pro rata* as a defense to the payment of such dividend.

*Affirmed by the Court of Appeals of Montgomery County without report, July 29, 1919.

A. W. Schulman and Mattern & Brumbaugh for plaintiff.
Murphy, Ellif & Leen, for defendant.

MARTIN, J.

This cause comes before the court upon a motion filed by the defendants for a new trial and to set aside the verdict of the jury and for judgment on the special verdict returned by the jury. This case is an action brought by the plaintiff against the defendant to recover a dividend informally declared and paid to the defendant with the understanding that the plaintiff was to permit his dividend to remain with the funds of the company until such time as he saw fit to withdraw it. The petition avers:

“That for many years and at the time of the occurrence of the matters herein set forth, the plaintiff and defendant, George Kramer, were the controlling stockholders and owners of said company; that owing to its close organization said company never *formally* declared dividends, but permitted its surplus earnings to accumulate, part of same being invested in building association stock, part re-invested in the business of the corporation and part invested in real estate in a subsidiary company known as the Kramer Brothers Realty Company. That in July, 1907, the defendant corporation had on hand and was possessed of a large surplus of undivided profits; that at said time the following agreement was entered into by and between the plaintiff and the defendant, George Kramer, and the other minor stockholders of the company as individuals and as officers of the corporation.

“That said company was to pay to George Kramer as his share of the undivided surplus profits and as a dividend on his stock the sum of eight thousand one hundred and sixty-five dollars and sixty-five cents (\$8,165.65) for the purpose of building a home for himself and that the company did then and there and at such time pay to the said George Kramer the said amount and this plaintiff being the owner of 420 shares of stock, was to receive the same amount of stock as a dividend upon his stock, but that by reason of the fact that plaintiff had no need for such sum at said time, it was agreed between the said parties as individuals and the officers and directors of the corporation that the plaintiff was to receive said amount, but he was to allow his said dividend to remain with the funds of the company until such time as he would require it for building a home for himself, etc.”

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The petition further avers that the defendant in 1912, made a demand for this dividend which was refused; that thereafter the plaintiff sold his stock in the corporation to the defendant, George Kramer, and after the sale brought suit for the amount of this dividend which he claims to be owing to him.

The defendant answered and admitted that George Kramer withdrew a sum approximating the sum of eight thousand dollars (\$8,000.00) for the purpose of building a home, and denies all the other allegations of the petition.

The defendant further alleged that the withdrawals of the company's funds made by the plaintiff and the defendant, George Kramer, about equalized each other. The defendant further alleged that the settlement between George Kramer and Joseph Kramer on the 16th day of October, 1914, also included a settlement of the claim of Joseph Kramer against the Kramer Brothers Foundry Company, which was the subject of this action, and that in accepting fifty-five thousand dollars (\$55,000) for his stock, that Joseph Kramer agreed to and intended to cancel this claim.

The case was tried to a jury and the defendant submitted the following form of special verdict, which was submitted to the jury, which special verdict with the answer of the jury is as follows:

"Question One (1). a. Was there any formal action of the Board of Directors of the defendant corporation at the meeting of July 7th, 1907, whereby permission was granted George Kramer to withdraw surplus funds of the corporation?

"Answer. No.

"b. Was any record of such meeting made, signed by the officers of the corporation?

"Answer. No.

"Question Two (2). State whether there was any formal action of or consent by, the board of directors of the defendant corporation, at the meeting of July 7th, 1907, or at any meeting thereafter, whereby any provision was made to pay all the other stockholders (outside of George Kramer and Joseph Kramer) sums of money out of the surplus of the corporation, proportionately to their various stockholdings in the corporation, so that they were to receive such an amount proportionate to their stock-

holdings as would equalize them with George Kramer on his withdrawal of \$8,165.65.

“Answer. No.

“Question Three (3). State whether the sum of money sued for in this case was ever separated from the general funds of the corporation that is, set aside or set apart from the same?

“Answer. No.

“Question Four (4). State whether the books of the corporation show or ever did show, the amount of money sued for in this case or any part thereof credited to the name of Joseph Kramer, and whether any writing or note was ever given by the corporation, that is, set aside or set apart from the same? thereof as a debt.

“Answer. No.

“Question Five (5). Was there any credit ever made on the books of the corporation to the names of any stockholders of the corporation with amounts, to equalize the amount George Kramer drew, proportionately to their various respective stockholdings?

“Answer. No.

“G. M. LAWDER, *Foreman.*”

The jury has returned a verdict for \$8,165.65 plus interest in favor of the plaintiff. They have also found a special verdict in the way of answers to a number of interrogatories framed by defendant's counsel. After the verdict and the special verdict counsel for defendant filed a motion asking for a judgment in their favor, notwithstanding the general verdict for the plaintiff, for the following reasons:

1. Because the special finding of facts made by the jury is inconsistent with said general verdict.

2. Because upon the statements in the pleadings defendants are entitled by law to judgment in their favor.

The special verdict in the case consists of answers given to five questions framed by counsel for defendants. The question raised by these five questions and the pleadings in this case is whether or not there was a dividend declared, as shown by the pleadings and the special verdict. There is no question but what the plaintiff is entitled to a judgment upon the general verdict, unless the general verdict is manifestly against the

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weight of the evidence. If there was no dividend declared by the defendant company under the law and in accordance with the principles of equity as shown by the pleadings and the special verdict, then the defendant would be entitled to a judgment.

The plaintiff in his petition has set forth that no formal action was taken in the declaration of this alleged dividend and that the company never did formally declare dividends. So that subdivision A, under question 1, in the special verdict, which reads as follows: "Was there any formal action of the board of directors of the defendant corporation at the meeting of July 7, 1907, whereby permission was granted George Kramer to withdraw surplus funds of the corporation?" to which the jury answered "No," is not inconsistent with the pleadings, and I do not believe that the defendants' counsel now will contend is so contrary to the law and the principles of equity as to preclude the plaintiff from securing judgment on account of that part of the special verdict alone. Neither does the court believe that counsel for defendants seriously contend that the answer "No" given by the jury in that part of the special verdict in answer to subdivision B of question 1, which reads as follows: "Was any record of such meeting made, signed by the officers of the corporation?" should preclude the plaintiff from a judgment in this case on a general verdict.

The court makes this statement because counsel for defendant in their brief have virtually admitted that under certain conditions a dividend informally made by the board of directors would be good, and as the court understands their claim, that such a dividend would be good in law under the state of facts disclosed by question No. 1 alone.

We will pass, therefore, to question No. 2 under the special verdict, which reads as follows: "State whether there was any *formal* action, or consent, by the board of directors of the defendant corporation at the meeting of July 7th, 1907, or at any time thereafter whereby any provision was made to pay all the other stockholders outside of George Kramer and Joseph Kramer sums of money out of the surplus of the corporation

proportionally to their various stockholdings in the corporation, so that they were to receive such an amount proportionate to their stockholdings as would equalize them with George Kramer on his withdrawal of \$8,165.65?" To which interrogatory the jury answered "No."

It requires no discussion or argument to show that the first part of this interrogatory, to-wit, "State whether or not there was any formal action of the board of directors," etc. "at the meeting of July 7th," etc., should not affect the general verdict, because it has been admitted in the petition, answer and reply, and in the testimony that there was not any formal action by the board of directors on July 7th, 1907, or at any meeting thereafter, and under the evidence there was no formal meeting at all of the board of directors or stockholders until some time in 1912. And as the court understands the claim of counsel for defendants, the fact that there was not any formal action would not in itself preclude plaintiff from a judgment on his verdict.

But coming on to the remaining portion of question No. 2, in which the interrogatory, by dropping the words "any formal action of" might be changed so as to read as follows: "State whether there was any consent by the board of directors of the defendant corporation at the meeting of July 7th, 1907, or at any time thereafter whereby any provision was made to pay to all the stockholders outside of George Kramer and Joseph Kramer sums of money out of the surplus of the corporation proportionately to their various stockholdings in the corporation, so that they were to receive such an amount proportionate to their stockholdings as would equalize them with George Kramer on his withdrawal of \$8,165.65," becomes a more serious matter. It becomes a more serious matter because, on account of the informality of the proceedings, under which it is claimed this dividend was declared, if the consent of all the stockholders and board of directors was not secured, that fact would or might be fatal to plaintiff's cause.

But let us inquire whether or not question No. 2 is stated in such form that the jury might know, by the exercise of

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ordinary intelligence, what the answer should be under the evidence. In the first place, there might be two answers to the question, of "Was there any formal action," because the pleadings as well as the evidence shows there was not; there could be no other answer than "No." While to the interrogatory, "Was there any consent," etc., the answer might be "Yes."

So the jury in its answer under that state of facts should answer "No" as to formal action, and "Yes" as to consent. The jury might very easily have construed this question to mean that the word "formal" should modify the word "action," and also the word "consent." If the question is so construed, the only answer could be "No," and only one answer would be needed.

The court does not care to make any frivolous discrimination but the pleadings do not show that this alleged agreement between George and Joe Kramer took place on July 7, or at any time thereafter. So far as the court knows, and there is evidence tending to establish that fact, this supposed agreement was entered into before July 7th, 1907, and in that case the jury could have consistently answered "No" and might have further amplified its answer by saying that the consent was given before July 7th, 1907.

But there is another reason why the jury in its answer might have given the answer "No," which would have been perfectly consistent with the true meaning of this question, double-barreled as it was, because the question reads as follows: "State whether there was any formal action of or consent by the board of directors of the defendant corporation at the *meeting* of July 7th, 1907, or at any meeting thereafter?" So that this question is modified by the phrase "at the meeting of July 7th, or at any time thereafter of the *board of directors*."

Now, the pleading does not state that this agreement was entered into at a *meeting of the board of directors*, and the evidence does not show that it was entered into at a meeting of the board of directors, either on July 7th, or at any meeting thereafter of said board. The fact is the evidence shows that

what was done did not occur at a meeting of the board of directors, on this or any other matter. The evidence as the court remembers it does not show that there was any meeting of the board of directors as a board of directors, until some time in 1912. There might have been a consent by each member of the board of directors and the stockholders given separately or individually or informally, without having been given at a meeting of the board of directors as a board. So that the jury could have consistently given the answer "No," to this question without having been inconsistent with the averments in the petition, or with the general verdict. If the question had been asked, "State whether there was any consent given by the members of the board individually, or by the stockholders individually, or in any manner, to pay all other stockholders," etc., the answer "No" might have been fatal to plaintiff's cause.

So that the answer "no" to question No. 2 on account of the way the question was framed is not conclusive in the mind of the court, even on the theory of the case which the defendants advocate.

In the case of *Davis v. Turner*, 69 O. S., 101, in the latter part of the third syllabus, we find the following language:

"To justify the court in setting aside or disregarding the general verdict on the ground that it is inconsistent with such special finding, the conflict must be clear and irreconcilable."

As the court has construed it there is no real conflict between the pleadings and the answer to this question; neither is there a conflict between this part of the special verdict and the general verdict. But if there be a conflict, the court holds that the conflict is not clear and irreconcilable with the general verdict under the law.

Thompson on Corporations, Second Edition, in the second volume, in Section 1074, under the head of "Directors Acting Individually," and not at a meeting, says:

"The rule that a board of directors must act as a body or unit is not iron-clad. It has already been seen that a by-law

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may be created by custom or usage. For similar reasons a board of directors may by acting separately in an individual capacity establish a custom or usage that will be binding upon them and upon the corporation. Thus where it appeared that from a long number of years by a customary usage corporate business was transacted by securing the separate consent of the directors, or that the business was customarily transacted at either a casual or informal meeting of the board, it was held as a matter of law to constitute sufficient approval in the absence of any law or by-laws restricting the directors to a different mode."

In the case of *Bank v. Sanford Fork, etc., Company*, on page 10 of the 157 Ind. Report, it was held that the directors acting separately could authorize the president to execute mortgages and other corporate instruments.

In the case of *Jordan v. Collins*, 107 Ala., 572, where the directors themselves owned all of the stock of the corporation and authorized the president to sell all the assets, it was held that it was immaterial that such authority was not given at the regular meeting of the directors.

In the 43 N. H. Rep., page 343, it was held *prima facie* sufficient proof for a stranger, of the concurrence of the directors of a corporation, to show that they assented separately.

In the 30 Vt. Rep., in the case of *Bank of Middlebury v. Rutland & Washington R. R. Co. et al*, the last syllabus reads as follows:

"It is not necessary that authority from a corporation to its agents to contract in its behalf, either under seal or otherwise, be conferred at an assembly of the directors unless that is their usual practice."

If the directors have adopted the practice of giving a separate assent to the execution of contracts in their name by their agents, it is of the same force as if done by a vote at a regular meeting of the board.

In Vol. 94 of the Texas Reports in the case of *The Harper Company v. Manning*, in the first syllabus we read as follows:

“The consent of all the stockholders of a corporation to the conveyance of its land by the president as a donation to a public improvement estopped them from claiming such land as distributees of the assets of the corporation on its dissolution, though the conveyance was not authorized by any vote of its directors or stockholders.”

In this case even land belonging to a corporation was donated, without consideration, to a public improvement by the consent of the stockholders alone, and not by any vote of either its directors or stockholders.

It is almost unnecessary in connection with those authorities to mention the case of *Groh's Sons v. Groh*, reported at page 85 in the 80 Appellate Division Reports of the Supreme Court of New York, in which the business of the corporation was conducted without the formality of holding directors' meetings or evidencing any pact of the corporation by written minutes.

The third question of the special verdict reads as follows: “State whether the sum of money sued for in this case was ever separated from the general funds of the corporation—that is, set apart or laid aside from the same?” To this question the jury answered “No.”

The court does not know what the jury construed this question to mean. As the court understands this question, it means to ask whether there was an absolute physical separation of the amount claimed by Joseph Kramer from the general funds of the corporation. That is, that this amount of money, for instance, should have been deposited in a bank other than the bank in which the corporation had its general funds. Placing this construction upon this question, the court can not see how the answer “No” given by the jury conflicts with the general verdict, or why this answer to this question would deprive the plaintiff of the right to a judgment under the general verdict.

The court does not understand the law requires after a dividend has been declared, that it must be physically segregated from the general funds of the corporation, in order to make the corporation liable to a stockholder entitled to a dividend. As

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the court understands the law, when under the rules of law and equity a stockholder is entitled to a part of a dividend, the corporation is indebted to that stockholder for that part without physical segregation. If the stockholder permits his part of the dividend to remain with the general funds of the corporation, he runs the risk of being considered only as a general creditor in case the corporation fails in business, and must *pro rate* with other general creditors on his dividend. So that in the end the corporation is indebted to him at least.

In the 7th Edition of Cook on Corporations, Vol. 2, in the latter part of Section 542, we read as follows:

“And where no specific fund has been set aside, a stockholder not having claimed or received his dividend, has, upon an insolvency of the corporation merely a claim of debt against the corporation, and must come in and fare as the other creditors do.”

The title to this section reads as follows: “A dividend declared and specifically set apart as a distinct fund belongs absolutely to the stockholders,” and throughout this whole section there is no other claim made outside of the fact that when it is physically segregated, it then becomes the absolute property of the stockholder.

There is no statement in this section that unless it be physically segregated the company is not indebted to the stockholder for his part of the dividend. In Section 5322, in the 5th Volume of second edition of Thompson on Corporations, we read: “After a dividend is declared it is a debt due from the corporation to the stockholder and is recoverable as such.” In the latter part of this section we read as follows: “In a case where a dividend had been declared payable at a future day, but no fund was set aside for its payment, and before payment the corporation became insolvent” it was held that the stockholders to the extent of their proportions of such dividends should share ratably with the creditors of the corporation.

In support of this finding the court cites *Lowne v. American Fire Insurance Company et al*, Sixth Page's Chancery Reports,

page 482; *Hunt, Receiver, v. O'Shea, Assignee*, 69 N. H. Reports, page 600; *Curry, Garnishee, v. Woodward*, 44 Ala. Rep., page 305.

Question 4 reads as follows: "State whether the books of the corporation show, or ever did show, the amount of money sued for in this case, or any part thereof credited to the name of Joseph Kramer, and whether any writing or note was ever given by the corporation to Joseph Kramer evidencing this sum or any part thereof, as a debt?"

To this the jury also answered "No," which, no doubt, is in accordance with the evidence. This question was evidently asked on the theory that the law required that the action of a corporation declaring a dividend could not be shown by parol evidence, or that the records of a corporation could not be changed by parol evidence. While this may be true in some states, and while it may be so held in some cases, there is no question but what in most of the cases cited showing informalities, parol evidence has been introduced for the purpose of showing that a dividend had been declared. It was partially so in the case of *Barnes v. Spencer & Barnes Company*, in 162 Mich. Rep., on page 509. It was so in the case of *Smith v. Moore* in the 199 Fed. Rep., page 689. It is also so in the case of *Larwill v. Burke et al*, in the 19 O. C. C., Rep., page 449. It was at least partially true in 70 N. J., Law Rep., in the case of *Breslin v. Fries, Brieslin & Co.*, page 274. It was especially true in the case already cited of *Groh's Sons v. Groh*, in the 80 N. Y. Appellate Division Reports, page 85.

If it even were the law that there must be a book account showing a credit to Joseph Kramer for the amount he claims in his petition, there is a book account showing the amount that George Kramer actually received, and from that fact, together with the fact that Joseph Kramer had an equal number of shares of stock with George Kramer, the inference could easily be drawn as to what amount Joseph Kramer was entitled without the introduction of parol evidence. Especially is this the case since in the defendant's answer defendant virtually ad-

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mits that there was such an understanding as set forth in the petition, to-wit, that both should have an equal share of this alleged dividend, by alleging that Joseph Kramer agreed to accept and did accept certain sums in full discharge and satisfaction of his claim. Besides, this contention is re-enforced by the fact that in the defendant's answer in the second paragraph thereof we find the following averments:

“Defendants allege that plaintiff and defendant, George H. Kramer, through payments made in behalf of each individually by the corporation for various purposes about equalized each other on withdrawals from the surplus of said corporation, notwithstanding which said Joseph Kramer continued to complain about the alleged expenditure in building the home of defendant, George H. Kramer, and demanded a like sum which was refused for the reason that he had been theretofore paid an amount equivalent to George Kramer.”

So the court finds that part of the special verdict contained in the answer to question No. 4 of the special verdict is not in conflict with the general verdict, and neither does it establish facts which would preclude Joseph Kramer from obtaining judgment under the law.

The fifth and last interrogatory in the special verdict reads as follows: “Was there any credit ever made on the books of the corporation to the name of any stockholder of the corporation, with amounts to equalize the amount George Kramer drew proportionately to their various respective stockholdings?” To which the jury answered, “No.”

The court thinks that a part of the same reasoning which applied to question 4 applies to question 5. The same question arises as to whether or not the declaration of a dividend might be proven by parol evidence, and it is true that the case of *Dennis v. Joslin Manufacturing Co.*, 19 R. I., 666, holds that it can not be so proven. But the court has already cited a number of cases in which such a dividend was either wholly or partly proven by parol evidence, and in the Groh case there was apparently nothing except parol evidence by which the declaration of a dividend could be proven.

So that the court can not see that the answer to question 5 is

inconsistent either with the pleadings, the general verdict or the law.

The court having found that neither one of the answers in the special verdict given by the jury was inconsistent with the pleadings, the general verdict or the law, the motion of the defendants for judgment in their favor, notwithstanding the general verdict for the plaintiff, will be overruled.

With this finding the court might cease its labors in further dictating this decision. But certain questions have been suggested by the interrogatories in this special verdict, and some of those questions can only be discussed by taking into consideration the evidence, or some of the evidence which has been adduced in this case. As the court has heretofore stated, the question in this case is, was there a dividend declared under the rules of law and equity?

Counsel for defendant claim that on account of informalities and irregularities no such dividend was ever declared, and that therefore, the profits out of which the plaintiff claims his share of the dividend, always remained a part of the capital of the company, and that consequently the company was never indebted to Joe Kramer in the amount for which he has brought suit, or any other amount.

Counsel for defendant claim this, first on the ground that a dividend must be declared formally by the board of directors in joint session. It is unnecessary to discuss this proposition because counsel afterwards admit that there are exceptions to this rule, and that this case in some respects at least might come under those exceptions provided the facts in the case would meet certain other conditions. And among those other conditions, is the second claim of defendants' counsel that the reason there wasn't a dividend declared is, that the dividend must be severed physically from the funds of the corporation.

I have discussed that proposition in passing upon its motion asking for a judgment notwithstanding the general verdict, and do not consider it necessary to discuss it again.

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Another, or third requirement to the informal declaration of a dividend claimed by counsel for defendant is that there must be a book account or note or some written evidence of the stockholder's share of the dividend. This I have also discussed under the motion, and do not deem it necessary to discuss it further under this head.

The fourth requirement, in case there is no written evidence as claimed by counsel for defendants, in order to make an informal declaration of a dividend binding, is that the dividend must have already been divided among those entitled thereto; in other words, must have been paid to the various stockholders, because a division of profits without the formality of a dividend is equivalent to a dividend. And, as the court understands counsel for defendant, the dividend must be paid because if it is informally declared the doctrine of *malum prohibitum* or *pari delicto* would apply. The doctrine of *pari delicto* could hardly apply in this case, because it could not be said that the corporation was *in delicto* so far as the informalities are concerned, and the only one that could be *in delicto* would be the plaintiff, Joseph Kramer, because, as the court understands the term *pari delicto*, it means in equal fault, that is, that all parties were at fault. The defendant claims that a contract that is in anywise illegal provided it is indivisible will not be rescinded if executed, and will not be enforced if executory. If this be true in such a case as this, why should it not have been more true in the case of *Groh & Sons v. Groh*, in the 80 N. Y. App. Division Reports?

It is scarcely necessary for the court to state all the facts in that case, because counsel on both sides have read it carefully, but according to the evidence in that case none of the rules and regulations applying to corporations were observed. They even had a faulty and very unsatisfactory system of bookkeeping. The books of the firm did not even show the profits, and they had to resort to parol evidence to show that there were sufficient profits to pay the dividend to John Groh and his mother.

Yet there was nothing said in this case in regard to *pari*

delicto, malum prohibitum, or anything of the sort. But counsel for defendant may say that the reason there was nothing said about the principles which he wishes to invoke as against Joseph Kramer, that the money had already been paid out, and, therefore, the court would not disturb the same because that was a contract executed, or a transaction already completed. But we must remember that the corporation brought this suit against John Groh. The corporation was not *in delicto*. The doctrine of *malum prohibitum* did not apply to the corporation. The corporation was the victim, if anyone was the victim, of the informalities and irregularities, and illegalities, if you please, of John Groh and his mother. So that the court could have very easily said that because of the doctrine of *malum prohibitum* and because the corporation is not at fault the court could disturb what had already been completed. John Groh was *in delicto*. The doctrine of *malum prohibitum* applied to John Groh, and did not apply to the corporation. Why should not the court have disturbed what had already been executed or completed, if John Groh was *in delicto* and the corporation was not?

Taking the case of *Barnes v. Spencer & Barnes Company*, 162 Michigan Reports. Barnes sues the company. There are informalities and illegalities to which Barnes was a party. Barnes was *in delicto*, if anyone was. The doctrine of *malum prohibitum* applied to him, if it applied to anyone on account of informalities and irregularities, and neither doctrine applied to the corporation which Barnes sued. Yet in the decision we find nothing in regard to either doctrine as applying to the plaintiff, Barnes.

In the case of *Breslin*, defendant in error, v. *Fries-Breslin & Company*, plaintiff in error, on page 283, quoting *Kent v. Quicksilver Mining Company*, 78 N. Y., 159, the court says, it was held that corporate acts not *per se* illegal, but which are *ultra vires* affecting only the interests of the stockholders, may be made good by the assent of the stockholders. And in this case the directors and stockholders were guilty of all the informalities in the calendar, with the exception that there was a book

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account showing a dividend. And so we find that in cases of the informal declaration of dividends, and on the ground of informalities, the doctrine of *pari delicto* or *malum prohibitum* has not been applied. The court does not believe that the doctrine of *pari delicto* or *malum prohibitum* applies to this case or similar cases.

I have now come to the last proposition of counsel for defendant: why there was not a dividend declared, such as would entitle a stockholder to recover against the company, and that is that the dividend must be divided *pro rata*. There is no question but what this rule is more universally applied by the authorities than any requirement pointed out by counsel for defendant. It is true that both Cook and Thompson state that a dividend must be divided *pro rata*; that is, that stockholders in the same class must be given the same percentage of profits on their stock. It is also true that the evidence shows in this case that in the agreement the only stockholders' names were George Kramer and Joseph Kramer. It is true that the evidence also shows that George Kramer and Joseph Kramer wholly controlled and managed this business, and the evidence tends to show that their brother Henry Kramer was an ordinary laboring man without an education, and evidently not endowed with executive ability in this or any other business. If the court remembers the evidence correctly, Henry Kramer was first simply given an interest in the partnership and afterwards an equal interest in the corporation, in order to encourage him in his work, but at any rate, at the time that this agreement was entered into between George and Joseph Kramer, Henry Kramer was the owner of some thirty shares of stock, however he may have secured the same. He was considered a *bona fide* stockholder, and was treated as such by the two brothers, George and Joseph. As this court remembers it, at the time of the declaration of this alleged dividend there were two stockholders in whose names there was one share of stock, in order to make up the legal number of directors. In other words, these two were only nominal stockholders and were not really *bona fide* stockholders. The evidence further shows that, before the incorporation, this com-

pany was a partnership, and, outside of keeping books, they did business without following strict business rules. The partnership was a family affair, and when it was incorporated it still continued to be a family affair. George, Henry and Joseph, after the incorporation, did business with each other just as they did in the partnership. Groceries, furniture, clothing and all family needs of all the former partners, when they became stockholders, were paid for out of the company treasury. Funeral expenses in the family of either of the brothers were paid out of the company treasury.

Prior to this agreement Henry had a lawsuit, the expenses of which amounted to \$1,100, which were paid out of the company treasury. The expenses of pleasure trips of the brothers were also paid out of the treasury. So that when George came to build a house he talked the matter over with Joseph and together they agreed that he might pay the expenses of building a house by drawing money out of the company treasury, with the understanding that Joseph might draw an equal amount. The evidence develops that all three brothers were engaged in the foundry business, and all three knew that George was building a house, and they knew that George was obtaining the money out of the company treasury. The evidence also shows that the stockholders had the opportunity of becoming acquainted with the fact, and did become acquainted with the fact, that there was an understanding that Joseph Kramer should draw out of the treasury in some way, either by travel or otherwise, an equal amount of money with George. George built his house and drew out of the treasury something over eight thousand dollars for that purpose. True, Joseph took some pleasure trips, but so did George, and there is evidence tending to show that the expenses for the pleasure trips about equalized each other, because Joseph claimed, and gave some testimony tending to show, that some trips which George claimed were pleasure trips on Joseph's part, were business trips for the company.

This state of affairs continued, all the stockholders, directors, and officers acquiescing and consenting so far as the evidence shows, to the agreement that had been entered into between

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George and Joseph Kramer, up until some time in October, 1912. Up until that time business had been carried on as formerly in a very informal way, without the meeting of directors or officers. Some time in October, 1912, after George Kramer had secured the majority of the shares they began to hold formal meetings, and it was at one of these formal meetings in October, that Joseph Kramer demanded he should be paid a sum of money equal to that paid to George Kramer. It seems that George Kramer at first refused, claiming that he had drawn an equal amount of money out of the funds of the treasury with what he had used for building the house. There is no denial that the arrangement had been entered into that Joseph should draw an amount equal to what George had drawn for building his house. In fact, all parties admit, according to the evidence, that there was such an arrangement and that Joseph was entitled to an equal share, but that Joseph had been paid.

The result of the dispute was that they agreed to give Joseph \$2,000, but called it a "donation" on the books of the company. Joseph, in his evidence, claims that they really only gave him \$1,000, and there is some evidence tending to show that this was charged against Joseph in some other matter. At any rate, the jury found that Joseph, in the end, was not even given the \$2,000.

The defendant in its answer states that Joseph frequently complained that he had not been made equal with George. And so the business of the firm went on until some time in 1914, when George purchased Joseph's interest. During all the period from 1907, when it is alleged that the agreement had been entered into between the two brothers, up until Joseph sold his interest in the firm to George, no member of the firm ever disputed, and in fact all of them admitted, that there was such an arrangement, and that Joseph was entitled to an equal amount with George, and the only claim that was made was that Joseph had been paid.

So that under the evidence it appears that at least all the stockholders and officers of the company knew of this arrangement, consented and acquiesced therein, and the court might

almost say that at the meeting of the directors in October, 1912, they had not only consented and acquiesced therein, but they ratified the same, if not formally, at least informally.

Now, the question is, under these circumstances, what shall be said of the proposition that the dividend, if there was one, must have been divided *pro rata* between George Kramer, Joseph Kramer and Henry Kramer, or any other stockholders? It is true that the authorities hold that the dividend must be *pro rata* among the stockholders of the same class, and what would be said or what should be said in case some other division should be made? Henry Kramer had just received \$1,100 for the purpose of paying the expenses of a lawsuit. George, Joseph and the other stockholders seem to have consented and acquiesced in this arrangement. So it would be natural to suppose that Henry would consent and acquiesce in the arrangement which George and Joseph Kramer had made in regard to the alleged dividend; and the other members being nominal stockholders would naturally have no objection to such an arrangement. At any rate, the evidence tends to show that all the stockholders and all the directors and all the officers did consent and acquiesce in the arrangement that Joseph and George made some time in 1907. And, as the court has already said, substantially ratified the same at a directors' meeting in October, 1912.

Now, it is true the general rule is that when a dividend is declared by the board of directors it must be *pro rata* among the stockholders of the same class. There is no question but what this is a wise rule, especially when applied to corporations where there are stockholders who are not members of the board of directors, especially when the stockholders are not familiar with the business of the concern.

Most of the decisions apparently hold that there must be a *pro rata* division of dividends among stockholders of the same class. But the court has been unable to find a case where there was not a *pro rata* division made in which the only shareholders were directors and all shareholders consented to a division other than *pro rata*, in which it was held that such a division

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would not be good under the law and the principles of equity. The court has been able to find but one case bearing upon this proposition, and this case is found in the 70 N. J. Law Reports, page 274, in the case of Thomas J. Breslin, defendant in error, v. Fries-Breslin Company, plaintiff in error.

In that case there were as many irregularities and informalities, if not more, than in the case before the court, and the only difference between that case and the case before the court was that the stockholder, Thomas J. Breslin, who brought suit, had standing on the books of the corporation the amount of money which had been credited to him as profits. In that case the directors of the corporation did not observe the statute law of the state of New Jersey, in failing to declare their dividends on the first day of August in each year, and they also failed to specify any other day, which the Legislature provided for, if they did not so declare a dividend on the first day of August. Another irregularity was that there were six members all of whom were directors, and it appears that at a certain meeting, four members out of six played a game of freeze out and passed a resolution that the common stock of three of the members should be transformed into preferred stock guaranteeing a dividend of fifteen per cent., against the objection of two of the members, McGill and Murphy by name; and it appears that three of these members, during the transactions involved in this suit, were the only directors in charge of the corporation. While these members apparently met informally, took inventories once a year, and figured out the preferred dividends and then the common stock dividends, there were never any dividends formally declared, and no minutes were kept of any of the meetings; no formal resolution was at any time passed; three of the directors instead of six did what business was done; no resignation was received from the three members whose stock had been voted out of the common stock class into the preferred stock class. And besides this, because it is directly in point to the proposition now under consideration, the three men who remained as directors had common shares of stock as follows: John M. Carroll, 200 shares; Fries, 100 shares; Breslin, 100

shares, and yet Breslin, who sued, brought suit for one-third of the profits on the common stock, although he was only entitled to one-fourth under the general rule, because Carroll was entitled to one-half, Fries one-fourth and Breslin one-fourth.

Now, what did the court say in that case? We will first read the syllabi, as follows:

“1. The doctrine of equitable estoppel applies to the internal concerns of stock corporations. Saving, so far as public policy and the interests of creditors and other third parties are involved, the stockholders may bind themselves *inter sese* and in favor of the corporation by their own acts and agreements; and what will bind all the stockholders with respect to an obligation from the company to one of its members, will bind the company as such.”

“2. Unanimous consent and acquiescence of the stockholders, acted on by the parties concerned to such an extent as to materially change their position, preclude the assenting stockholders as individuals and the corporation as such, from afterwards setting up legal informalities in matters of internal concern affecting only the interests of the stockholders, to the overthrow of rights that have been acquired on the faith of the consent and acquiescence.”

On page 276 we read as follows:

“The principal questions raised by the bills of exceptions are whether there was any lawful evidence justifying a finding by the jury that these amounts, respectively, were lawfully declared and set apart to the plaintiff as dividends by the board of directors.”

The share of the dividend sued upon appeared in a book account, credited from April 25, 1893, to December 31, 1898. The action was commenced in November, 1902. The court says, on page 280:

“To sum up, the jury was justified, by the evidence, in finding,” * * * then on page 281, near the top of the page, * * * “that the three directors, during the period in question, acted unanimously and with the acquiescence of all the stockholders in ascertaining the profits at stated times, in determining what amount should be reserved as working capital

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and in setting apart the residue of the profits for distribution among the stockholders; that in such distribution preferred stockholders were first paid or credited amounts aggregating fifteen per centum per annum upon their stock and the residue was divided among the common stockholders, *not pro rata*, according to their holdings, but in a manner satisfactory to them and acquiesced in by all the stockholders.”

On page 282, the last sentence of the first paragraph reads as follows:

“In respect to these matters the jury was fully justified in finding that unanimous consent of the stockholders of the defendant company had been given and had been acted on in good faith by the plaintiff and others concerned during a course of years, and that plaintiff could not be restored to the status *quo ante* were the assent of his fellow-stockholders and of the company to be now withdrawn.”

In the next paragraph we read:

“In the eye of the *law* corporations are entities, separate and distinct from their constituent members and not bound by the individual acts of the latter. The law deals with the corporation as an artificial person. Equity realizes that this legal entity is but a legal fiction; looking through the form it discerns the substance. It finds that a stock corporation is in essence an aggregation of individuals, a statutory partnership with assignable membership and limited liability of the members, and so the doctrine of equitable estoppel applies fully to all the internal concerns of stock companies. Saving so far as public policy and the interests of creditors and other third parties are concerned (none of which is involved in the present case), the stockholders may bind themselves *inter sese* and in favor of the corporation by their own acts and agreements, and what will bind *all* the stockholders, with respect to an obligation from the company to one of its members, will bind the company as such.”

Going on in the next paragraph, the court says:

“The authorities to this effect are abundant.” And then quotes a number of authorities, and ends on page 284, in citation of authorities as follows:

“Although estoppels be based upon equitable considerations, they are none the less available in the courts of law.”

And then cites some five or six cases in support of this proposition. In the next to the last paragraph on page 284, we read that, among sundry exceptions raised concerning the instructions to the jury, they raised the question as to the method of apportionment that was pursued. On page 285, in the paragraph at the bottom of the page, we read in part as follows:

“The trial justice further charged the jury, in effect, that whenever the directors set apart a portion of the profits of the company for division among the stockholders, it is their *prima facie* duty to apportion the dividend among the stockholders *pro rata* to their several holdings; but *that if all the stockholders who are entitled to participate in the division authorize, ratify or acquiesce*, in any distribution of the fund among themselves, differing from the *ordinary pro rata division*, the directors may make the division in accordance with such authorization, ratification, or acquiescence of all the stockholders. He left it to the jury to say, upon the evidence, whether the division actually made of the profits as between the stockholders in the case at hand was authorized, ratified or acquiesced in by the holders of all the stock.”

On page 287 we find the following at the end of the first paragraph:

“It is true that the directors are trustees for the several stockholders, charged with the duty of properly apportioning among them the moneys thus set apart for their use. And so the judge charged the jury. But it can not be doubted that the stockholders may, by unanimous consent, adopt and become bound by a different mode of division.”

We find in this case that the judgment of the lower court was affirmed. The court has failed, as it said before, to find a single case in which it was held it was error to divide a dividend other than *pro rata* in case all the stockholders involved consented or acquiesced therein. This is the only case the court has been able to find decided, when all the stockholders did acquiesce in a division other than *pro rata*.

This decision is quite lengthy or the court would quote it in full. It not only bears upon the question of *pro rata* division of profits, but bears upon every proposition raised in this case.

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And, as already quoted, notwithstanding that illegalities, informalities and irregularities appear in the declaration of the dividend involved in the case, the court substantially holds, on page 283, that all these illegalities, irregularities and informalities were not *per se* illegal.

Since the evidence shows that what was done of an informal nature in the case now before the court, was done by unanimous consent and acquiescence of the stockholders, and that there is evidence tending to show that Joseph Kramer acted upon said consent and acquiescence to such an extent as to materially change his position, because when he sold his stock he lost every other remedy, if he had one, except the one to which he resorted in bringing this suit.

For this reason, provided the jury has been correct in finding the facts, the court would hold that the stockholders, as individuals, and the corporation as such, are precluded from setting up the legal informalities in matters of the internal concerns affecting only the interests of the stockholders of this company. There are a number of other authorities which have been quoted by counsel for plaintiff bearing upon the propositions raised in this case.

Taking into consideration all the law and the evidence, the court thinks that the jury had a right, under the law and the evidence, to return a verdict such as it did, and, therefore, will overrule the motion for a new trial.

PERPETUAL LEASE NOT A BAR TO PARTITION.

Court of Common Pleas of Hamilton County.

ALBERT T. BROWN, v. JOSEPH RAWSON, ET AL.

Decided, July, 1920.

Partition—Not Barred by a Perpetual Lease—Possession of the Lessee is the Possession of the Landlord—His Rights are not Affected by a Change of Landlords.

Partition of real property may be compelled at the suit of one of the tenants in common of the fee, notwithstanding the existence of a perpetual leasehold in the property.

Pogue, Hoffheimer & Pogue, for plaintiff.

William R. Collins, contra.

DARBY, J.

The plaintiff alleges that he is a tenant in common with the defendants of certain real property situate in Cincinnati at the southeast corner of Ninth and Race streets, and asks partition thereof, or if partition can not be had without manifest injury, that the same may be sold and the proceeds distributed according to the rights of the parties.

In a cross petition filed by Joseph Rawson, and which is adopted by the other parties in interest, it is alleged that the premises referred to are subject to a perpetual lease made by the ancestor of the parties.

The cause came on for hearing upon the petition, and objection was made to a decree in partition for the reason that the property, being subject to a perpetual lease, partition thereof could not be compelled. Subsequently, a motion was made by the defendant, Joseph Rawson, to dismiss the action for the reason that the court is without jurisdiction over the subject matter thereof. By this motion the same question is raised as was raised upon the hearing of the cause, namely, that existence of the perpetual lease upon the property prevents its partition. It should be noted in passing that the cross-petition of Joseph Rawson and the other defendants asked for partition upon the said cross-petition.

The question for determination is this: May one tenant in common of real property, subject to a perpetual lease, compel partition of said property during the life of the lease?

General Code, 12026 provides:

“Tenants in common, and coparceners of any estate in lands, tenements or hereditaments within the state, may be compelled to make or suffer partition thereof in the manner hereinafter prescribed.”

That the parties to this action are tenants in common of an estate in lands goes without saying. That the parties to this

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action are bound by the lease of their ancestor is equally true. That the grantees of the parties, in case of a deed by them, would be bound by all the terms of the lease referred to and that the lessee's rights cannot be affected or its possession interfered with, so long as it complies with the terms of the lease, cannot be gainsaid. It is equally true that the parties to this action are enjoying the rents reserved in the lease, and that as a matter of law the possession of the lessee is regarded as the possession of the landlord.

It follows from the foregoing considerations that the only effect so far as the lessee is concerned of a partition or sale of the property would be a change of landlords. It is manifest in this case that the property cannot be divided, and that if partition were decreed a sale would be essential. However, if there is no right to partition there could not be in any event a sale.

The claim of the defendants seems to be that inasmuch as the interest of the lessee has some of the attributes of a fee simple title, or that the lessee may purchase the fee, that partition may not be decreed. Two cases in particular have been brought to the attention of the court, supposed to sustain this contention.

In *Tabler v. Wiseman et al.*, 2 Ohio St., 208, the facts as stated by Ranney, J., are as follows:

“It appears from the petition that John Manly died seized of the tract of land of which partition was sought, the whole of which was assigned to his widow as her dower, who was still living when these proceedings were had. The parties to the suit are his heirs at law, and the question is, can partition be had during the continuance of her life estate? The court below held that it might, and as the lands could not be divided, and one of the heirs elected to take the same at the appraised value, the court confirmed the election so made, and ordered a deed to be made upon payment of the purchase money.”

The gist of the decision of the court is found in the following clause from the syllabus:

“Hence, when there is an outstanding estate for life, vested in a third person, in the whole premises of which partition is sought, the reversioners or remaindermen cannot have partition, either in law or in equity.”

It will be very readily seen that the land involved in that case was assigned to the widow as her dower as an entirety; therefore the remaindermen or reversioners had no interest in the rents and did not have nor could they acquire the right of possession of the property as against the widow during her life. The partitioning and sale of that property in effect put her out of possession, to which she was entitled during her life.

Eberle et al vs. Gaier, Jr. et al., 89 Ohio St., 118, followed and approved *Tabler v. Wiseman* above referred to. In that case the facts were that Barbara Gaier, deceased, devised real estate involved to her children in equal shares subject to a life estate devised to Gaier, Sr. In an answer, Gaier, Sr. undertook to consent to the partition or sale of the land free from his life estate, and agreed to take the value of the same in money. In that case it is clear that under the will the remaindermen had no present rights or interest in the property, none of the rents or profits went to them, and they neither had nor could acquire, as against the life tenant, possession of the property. The principle which prevented the partition of the property in that case was the same as that involved in *Tabler v. Wiseman*.

The solution of this problem is greatly advanced by the recent decision of the Court of Appeals of this county in *Crowe et al v. Crowe et al.*, 31 O. C. A., —. In that case there was a lease upon the property proposed to be partitioned for the term of five years with a privilege of purchase at any time within the life of the lease, and a provision for renewal for five years more on the same terms and with the same privilege of purchase. One of the defendants demurred to the petition, contending that the outstanding lease with option to purchase prevented partition. The court below overruled the demurrer and judgment was rendered upon the petition. The syllabus of the case is as follows:

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“The existence of a lease for five years, renewable for five years, and granting an option to the lessee to purchase the land, is no obstacle to partition.”

In the opinion of the court is the following:

“To enable a party to maintain an action for partition he must have an estate in possession, one by virtue of which he is entitled to enjoy the rents or the possession as one of the co-tenants thereof. *Eberle v. Gaier*, 89 Ohio St. 118, and *Tabler v. Wiseman*, 2 Ohio St. 207.

“The existence of an *ordinary* lease for years, under which the tenant is in possession, paying rent to the owners of the fee, is no obstacle to partition among such owners. *Werner v. Glass*, 16 W. L. B. 354 (9 Dec. Re. 636); *Willard v. Willard*, 145 U. S. 116, and 21 Am & Eng. Ency Law (2 ed.), 1153. See also 21 Halsbury's Laws of England, 841.

“The possession of a tenant is regarded as the possession of the landlord, as shown in the foregoing authorities. Plaintiffs in error maintain that by reason of the existence of the option to purchase the title is defeasible, and may be defeated by the lessee exercising the option. Their contention is based upon the opinion of the court of appeals for the fourth district in *Fleming v. Minx*, 25 C. C. (N. S.), 198; 4 Ohio App. 406.

“The defeasibility of plaintiff's title does not disable plaintiffs from prosecuting partition. The existence of a power of sale outstanding in trustees which might likewise destroy the estate of the lessors does not bar partition. (*Boyd v. Allen*, 24 Ch. D. 622.) The owner of a base fee is entitled to partition. *Askins v. Merritt*, 254 Ill. 92 (98 N. E. 256), and *Pitzer v. Morrison*, 272 Ill. 291 (111 N. E. 1017). The full report of the case of *Fleming v. Minx*, supra, shows that the so-called tenant was in fact a mortgagor in possession, though nominally she had only a lease with right to purchase.”

The mere existence of the option is insufficient to take the case out of the rule established by the foregoing authorities.

The case of *Werner v. Glass*, 16 W. L. B., 354, was decided by the general term of the superior court by Judges Harmon, Force and Peck. The syllabus is as follows:

“The existence of an ordinary lease for years, under which the tenant is in possession paying rent to the owners of the fee, is no obstacle to partition among such owners.”

It was contended in that case that the case of *Tabler v. Wiseman*, 2 Ohio St., 208, was conclusive of that case but the court held otherwise, and said:

“While some of the possible inconveniences or inequalities referred to by the court among other reasons for its conclusion, might exist in cases of property leased, especially if for long terms, the principle of the decision was that as partition deals with possession only, it cannot be had unless the parties praying partition have the possession. It is conceded that actual possession is not necessary; an estate which gives the right to possession will suffice.

“It is evident, therefore, that the term possession is used as opposed to expectancy, as defining the nature of the estate rather than referring to its physical occupation.

“The estate of the parties here is not one in expectancy, but in possession, because from the days of the feudal system until now, the possession of a tenant has been considered the possession of the landlord, except so far as concerns rights depending upon actual physical occupation such as the action of trespass.”

It is therefore the settled law in this state that what is called an ordinary lease for years is no obstacle to partition of the leased property.

Is there any reason for a different rule as applied to property held under a perpetual lease? It may be well to examine the law as to just what a perpetual leasehold estate is. We must start out by conceding that it is a leasehold created by contract in which there are lessor and lessee whose rights are contractual in their nature. At common law such an estate was a chattel real, but by reason of the various statutes passed in this state such leaseholds descend as estates in fee and are subject to judgments and executions as real estates.

In *Taylor v. DeBus et al*, 31 Ohio St , 468, 472, is the following:

“Now, it is contended that, by force of this legislation such estates are no longer chattels; that the creation of such an estate in lands is equivalent to an absolute transfer of the fee, and, therefore, the common law incidents of leasehold estates are abrogated. Such results do not follow such legislation. To the extent that leasehold estates have, by statute, been subjected to the rules which govern estates in fee, of course the rules of

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the common law, in respect thereto, have been abrogated; but beyond this, the common law continues to furnish the only rules for the guidance of courts in determining the rights of parties in relation to leasehold estates. And it is quite clear to our minds that there is nothing expressed in these statutes, and nothing implied, that modifies the common law in respect to the rights or liabilities of the parties to this record. As to these lands, the plaintiff in error was lessor and reversioner, and the defendants in error, lessees and owners of the term; and the annual compensation payable to the lessor for the use of the premises during the term, is rent and nothing more."

In harmony with the last decision is the principle involved in *Village of St. Bernard v. Kemper et al.*, 60 Ohio St., 244, in which a tenant under a lease of real property for ninety-nine years, renewable forever, the property standing in his name for taxation, was held to be—

"so far the owner of such property as to authorize him to subscribe a petition for street improvements under Section 2272 Revised Statutes; and in such case the signature of the lessor to such petition is not required in order to authorize an assessment against the corpus of such property."

In view of these cases it seems useless to further undertake to distinguish between the dower estate in the case of *Tabler v. Wiseman* and the life estate in the case of *Eberle v. Gaier*, on the one side, and the perpetual leasehold of the lessee in this case.

In the case of *Hopple v. Hopple*, 12 O. L. R. 223, another member of this court decided that—

"Partition may be had of land which is subject to a lease for ninety-nine years renewable forever."

Has the lessee a right to object to partition by his lessors?

It is not objecting. Its rights and liabilities are fixed and certain; they are indefeasible so long as it pays the rent and otherwise complies with its contract; it cannot be dispossessed (if it does comply with its contract) by the act of any person or persons.

If a lease for years with a privilege of purchase is no obstacle to partition, and such is the settled law of this state, the court is unable to see why length of duration of the leasehold estate can in any wise change the principle involved. If the land were susceptible of division the only effect would be that each of the tenants in common would collect his proportionate part of the rent under the lease. As indicated above, the fact that the property is not susceptible of partition among the lessors or reversioners would not in a proper case prevent a sale and distribution of the purchase price.

It is the opinion of the court therefore, that the plaintiff is entitled to compel partition of this land, though it is subject to a perpetual lease.

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IMPRISONMENT FOR FAILURE TO PAY TAXES.

Common Pleas Court of Hamilton County.

EX PARTE JOHN H. FLYNN, JR.

Decided, October 7, 1920.

Constitutional Law—Validity of the Cincinnati Occupational Tax Ordinance—Provision of Fine and Imprisonment for Failure to Pay—Not in Contravention of the Constitutional Inhibition Against Imprisonment for Debt.

The duty of a citizen to pay taxes legally imposed is a public duty owing to the sovereign, the violation of which is identical with a breach of any other law prescribing rules of conduct, and a penalty of arrest or fine for failure to pay such a tax is not in violation of the constitutional provision against imprisonment for debt.

Eli G. Frankenstein, attorney for petitioner.

Saul Zielonka, City Solicitor.

Joseph H. Woeste, Prosecuting Attorney of the Municipal Court.

MATTHEWS, J.

This is an application for a writ of habeas corpus. The petitioner was charged by affidavit in the municipal court of Cincinnati with having violated Section 812-10 of the code of ordinances of the city of Cincinnati, by engaging in the occupation of machinery manufacturer without having first paid the annual occupation tax.

Having failed to appear to answer the charge a capias was issued, under which he was arrested, and at the time of the filing of the application herein he was restrained of his liberty by confinement in the police station.

It is claimed in this proceeding for a writ of habeas corpus that his confinement was illegal for the following reasons:

First. That the municipality has no power to enact an occupational tax ordinance.

Second. That the ordinance in question is unconstitutional and void because of the classification of occupations made by it.

Third. That assuming the power of the municipality to impose an occupational tax, and that the ordinance is a valid ex-

ercise of the power that it is beyond the power of a municipality to make the non-payment of such tax a misdemeanor punishable by fine and imprisonment, in that it violates Section 15 of Article I, of the Constitution prohibiting imprisonment for debt.

On behalf of the respondent, the chief of police of the city of Cincinnati, these contentions of the petitioner are controverted, and it is also urged that the writ should not be awarded for the additional ground that the petitioner had a plain and adequate remedy at law by raising these questions in the municipal court in the case in which he was arrested and by proceedings in error therefrom. These contentions will be considered in the order named:

First. It seems to the court that the first contention of the petitioner is foreclosed by the decision of the Supreme Court in the case of *State, ex rel Zielonka, v. Carrel, Auditor*, 99 O. S., 220. In that case the Supreme Court had under consideration the validity of an ordinance passed by council of the city of Cincinnati embracing an annual tax upon manufacturers of bottles and glassware articles, and osteopathic physicians. The Supreme Court held that the city of Cincinnati had the power to levy an occupational tax, and that the ordinance in question was a valid exercise of that power. The syllabus of that case is as follows:

“1. The state of Ohio, under the provisions of Section 10. Article XII, of the Constitution, has authority to levy excise taxes in the form of an occupational tax.

“2. Under the grant of power of local self-government provided for in Section 3, Article XVIII of the state Constitution, the city of Cincinnati, as long as the state of Ohio through its General Assembly does not lay an occupational tax on businesses, trades, vocations and professions followed in the state, may raise revenue for local purposes, through the instrumentality of occupational taxes.

“3. The ordinance of the city of Cincinnati providing that an annual tax shall be laid upon all persons, associations of persons, firms and corporations pursuing any of the trades, professions, vocations, occupations and businesses therein named, is a valid exercise of the legislative power of such city.”

The reasoning of the court in that case answers the contentions of the petitioner in this case on the subject of the power

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of the city of Cincinnati to levy an occupational tax and the decision in that case is binding upon this court.

Second. It seems to the court that that case also forecloses consideration of the second contention of the petitioner, as a matter of original research and reasoning. The court having held that an ordinance segregating the occupations of manufacturing bottles and glassware articles, and osteopathy, from all other callings and imposing a tax thereon, to be valid, it seems to this court it follows inevitably therefrom that an ordinance such as the one under consideration which classifies a multitude of occupations and imposes taxes thereon, is equally constitutional and valid. If the selection and imposition of a tax upon two occupations is not unreasonably discriminatory, certainly the inclusion of a multitude of the most common occupations would not be so unreasonably discriminatory as to exceed the legislative power of the government and require the judicial department to so declare. As is said in that case at page 226:

“It is possible that the imposition of such taxes may in certain instances be oppressive, but the same general objection can be made to taxation in any form. We must ultimately depend on the fairness and good sense of the lawmaking power.”

Other cases holding that a law or ordinance providing a classification of occupations upon a reasonable basis is a valid exercise of the taxation power in the absence of state constitutional inhibition, are *City of Newton v. Atchison*, 31 Kas., 151; *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S., 232.

Third. By section 812-10 of the ordinance in question it is provided:

“Any person, association of persons, firm or corporation carrying on any such trade, profession, occupation or business in said city without having paid the tax herein provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not less than five (\$5.00) dollars nor more than one hundred (\$100) dollars for each offense.”

It was under this section that the defendant was arrested.

By Section 15 of Article I of the Constitution of Ohio, it is provided:

“No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.”

It is claimed that this section of this ordinance imposing a fine for carrying on an occupation without having paid a tax violates this section of the Constitution.

It seems to the court that this contention of the petitioner fails to take into account the nature of the act on account of which the fine is imposed. The city of Cincinnati, as an agency of the state, has enacted that followers of certain occupations shall pay a tax and that the occupation shall not be pursued until and unless the tax is paid. By this ordinance a duty of citizenship is imposed which duty transcends that owing from one private citizen to another; it, instead of being classified with duties owing from one citizen to another, is properly classified as a public duty imposed by and owing to the sovereign, the violation of which constitutes a breach of public duty identical with a breach of any other law prescribing rules of conduct for the citizens.

In *Cooley on Taxation*, at pages 18, 19, 20 and 21, the rule on this subject is stated as follows:

“But in general, the conclusion has been reached that when the statute undertakes to provide remedies, and those given do not embrace an action at law a common law action for the recovery of the tax as a debt will not lie. The assessment of the tax, though it may definitely and conclusively establish a demand for the purpose of statutory collection, does not constitute a technical judgment; and the taxes are not ‘contracts between party and party, either express or implied; but they are the positive acts of the government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required.’ They do not draw interest, as do sums of money owing upon contract; but only when it is expressly given. They are not the subject of set-off, either on behalf of the state or the municipality for which they are imposed, or of the collector, or on behalf of the person taxed, as against such state, municipality or collector. *The law abolishing imprisonment for debt has no application to taxes; and the remedies for their collection may include an arrest if the legislature shall so provide.*”

In the case of the *City of Charleston v. Oliver*, 16 S. C., 47, it was held:

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“The city of Charleston under the authority of an ordinance of that city may give judgment for the amount of a license tax and penalty, or imprisonment for thirty days in case of non-payment.”

South Carolina had, at the time, a constitutional inhibition against imprisonment for debt.

In the annotation to *Carr v. State*, 34 L. R. A., 654, the rule is stated thus:

“In cases where it has been sought to enforce the payment of taxes by attachment and imprisonment, the question has been raised whether such proceedings are unconstitutional as being contrary to the provisions of the state constitutions prohibiting imprisonment for debt. The courts have, however, for the most part, held such proceedings regular, holding that taxes are not debts within the constitutional inhibition. Taxes are not debts within the meaning of the Constitution of the United States.”

The collection of cases on this subject in the aforesaid annotation, are of the same uniform tenor and support the rule. See also, *Palmer v. McMahan*, 133 U. S., 660.

It seems to the court that the reasoning in the case of *State, ex rel Cook, v. Cook*, 66 O. S., 566, in which it was held that the decree for alimony could be enforced by contempt proceedings, is equally applicable to the solution of the question before the court. At page 572 the court in that case said:

“It seems manifest that so far as the obligation of the husband enters into the consideration and affords a basis for the court’s action, it is not a debt in the sense of a pecuniary obligation; it arises from a duty which the husband owes as well to the public as to the wife, but it is not upon any specific contract; nor is the proceeding in which the adjudication is had a civil action. The liability originates in the wrongful act of the husband against the consequences of which the public as well as the wife has the right to be protected.”

So in the case at bar the obligation of the petitioner was not created by any agreement on his part, but was imposed by the sovereign power upon him against his will, and became a part of his public duties as a citizen; and for that reason the court is of the opinion that the constitutional provision against imprisonment for debt has no application to the penal provisions contained in the occupational tax ordinance.

Fourth. While it is not necessary, in view of the conclusions already announced, to pass upon the respondents contention that the petitioner has a plain and adequate remedy at law, and therefore is not entitled to the writ of habeas corpus, it is not inappropriate to say, in answer to the contention that an unconstitutional law confers no jurisdiction even upon a court having general jurisdiction in criminal matters, that whenever a court assumes to hear and determine a charge defined as criminal by an *unconstitutional law* it is not hearing a *criminal charge* and is acting beyond its jurisdiction. Such being the law it follows that imprisonment pending or after judgment in such a proceeding is illegal and the person so deprived of his liberty is entitled to the writ of habeas corpus. Bailey on Habeas Corpus, Sec. 37.

For the foregoing reasons the application for writ of habeas corpus is denied and the petitioner remanded to the custody of the chief of police.

WIDTH OF THE NATIONAL PIKE AND ABUTTING RIGHTS.

Common Pleas Court of Clark County.

EDWIN O. BOWMAN V. THE WESTERN UNION TELEGRAPH COMPANY.

Decided, March 27, 1920.

National Pike—Width of—Abutting owner's Title to the Middle of the Road—Encroachment on Roadway does not Give Title by Adverse Possession—Change in Location of Telegraph Poles May not be Made Without Compensation to Abutting Owner Where a New Burden Would be Imposed.

1. Eighty feet was fixed as the width of the roadway, by the federal act of 1820 providing for the survey of the Cumberland Road, later known as the National Pike, from Wheeling, West Virginia, westward through the states of Ohio, Indiana and Illinois, and as originally built the width of the road between Columbus and Springfield was eighty feet.
2. The federal government retains title to land until the issuance of a patent.
3. When property was purchased from the government in 1811, but payments were not completed nor patent issued until 1825, the land

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- then patented was subject to the right of way for the road thereafter to be located but provided for in the federal act of 1820.
4. The abutting landowner has the title to the middle of the road, subject to the right of the public to use the same for all requirements of travel.
 5. An abutting owner, fencing in a part of the roadway not necessary for travel, acquires no right against the public by adverse possession no matter how long he has maintained his fence.
 6. The state, at any time it becomes necessary, may have the use of the entire roadway for the purposes of public travel.
 7. The appropriation of a portion of a public highway for the purposes of a telegraph line is a new use and an additional burden upon the landowners right in the road.
 8. A telegraph company whose poles and lines have occupied a certain portion of the highway for many years can not, without compensation to the abutting owner, occupy a new position which will lay a new and additional burden on such abutting owner's interest in the roadway.
 9. The fact that the state, through its officers, has ordered a telegraph company to move its poles so that the highway may be improved does not relieve the telegraph company from such obligation.
 10. The right of the abutting property owner to use the roadway, subject to the right of the public, is property and such right can not be materially abridged for uses other than those of public travel, without compensation, even though the injury may be slight.

J. E. Bowman and *John H. Cole*, for plaintiff in error.

John G. Price, Attorney General, *B. W. Gearheart* and *William J. Meyer*, for defendant in error.

GEIGER, J.

The petition alleges that the defendant is a corporation organized under the laws of New York, owning an electric telegraph extending from Springfield to the city of Columbus; that the plaintiff is the owner of a farm, including all that portion of n. e. quarter of Section 35, Town. 6, Range 9, M. R. S., lying north of the National Road in Harmony Township; that said National Road is a public highway not exceeding sixty feet in width; that the land of the plaintiff abuts on the north side of said highway for a distance of one hundred and sixty rods; that the defendant has maintained for many years a line of poles with wires along the north side of the National Road, about twenty-eight feet from the center of the road and about two feet

south of the fence between the plaintiff's land and the highway, which fence has been maintained in its present location for over fifty years; that the defendant threatens to move said pole line and wires and fixtures from its present location on the frontage of plaintiff's land and relocate the same about seventeen feet north of its present location and outside the limitation of the highway and on the lands of the plaintiff, to the injury of the plaintiff's land and without any right or authority, to the plaintiff's irreparable damage. The plaintiff prays for a temporary restraining order and that upon the hearing the injunction be made perpetual.

The telegraph company answers admitting the ownership of the plaintiff's land and that it maintains and for many years has maintained a line of poles with wires along the National Road and denies each and every other allegation.

The state of Ohio intervenes through its Attorney General and answers admitting certain allegations in reference to the location of the land and the line of wires and avers that it is proceeding to improve that section of the road which adjoins plaintiff's land and as a part of said improvement has ordered the defendant telegraph company to move its line northward from its present location and that the proposed action of the defendant, The Western Union Telegraph Company is in pursuance of such order.

The question of fact involved in the case is the width of the National Pike throughout its length and especially where it passes along the plaintiff's property. The plaintiff has introduced testimony tending to show that the fence enclosing his land is now and for many years has been less than forty feet north of the center line of said road.

The act of Congress, approved May 15, 1820, authorizing surveys to be made for a continuation of the Cumberland Road from Wheeling in the state of West Virginia through the states of Ohio, Indiana and Illinois provided:

“and so much of the lands of the United States as may be included within the same shall be and is hereby reserved and excepted from the sales of public land; the said road to be eighty feet wide and designated by marked trees, stakes, etc.”

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Photographic copies of contracts for the construction of that portion of the road west of Columbus are introduced showing that there were four separate contracts for the construction of said road, all made in April 1833 and all having the following specifications:

“All stumps and roots are to be grubbed with care, to a distance of twenty feet on each side of the center of the said road, and all trees, logs, brush and rubbish, are to be carefully removed for the space of forty feet on each side the same center.”

These contracts were made in accordance with advertisements that appeared in the Ohio State Journal in 1833 asking for bids on the work covered by the contract, designating the width from which all trees, brush and rubbish was to be removed as forty feet on each side of the center line of the road. A report to the Ohio Senate of a special committee, dated March 16, 1839, indicates that the portion of the road between Lafayette in Madison county and Springfield in Clark county was partially finished.

The plat of the village of Brighton, Clark county, Ohio, surveyed in 1835, recites that the National Road, which forms the center street of the town, is eighty-two feet in width.

The plat of Vienna, Clark county, Ohio, a village west of Brighton and about six miles east of the land in question, surveyed in 1833, recites that the street called Main street, being the National Road, is laid out eighty-two feet broad.

The plat of the village of Harmony, Clark county, Ohio, about one-quarter of a mile west of the plaintiff's property, surveyed in 1853, shows the National Road at that point to be about eighty-two feet wide.

The plat of Donnelsville, six miles west of the city of Springfield, surveyed in 1836, recites that Main street, being the National Road, is eighty feet wide.

Main street in Springfield, which is the National Pike, is sixty-six feet wide.

Evidence is introduced showing that on the portion of the plaintiff's land, east of Beaver creek, there is a line of old fence posts approximately forty feet north of the center line of the

pike, and that west of said creek there are several stumps of old posts about that distance from the center of the pike. Two government mile posts, near the plaintiff's land are about forty feet from the center line of the road.

It appears that the center of the pike is clearly marked by the center of the wooden bridges, which yet remain, spanning streams crossing the pike, one of which is located immediately in front of the plaintiff's land. The engineer for the State testifies that for the entire length of the road from Wheeling, West Virginia, through Zanesville and Columbus to Springfield all abutting property owners, except plaintiff, have recognized that the width of the National Road is eighty feet, and it is further testified to by the engineers for the State that in the construction of the road it is necessary to include within the road limits this entire width of eighty feet.

The act of the Ohio Legislature of the date of May 13, 1861, (58 O. L., 140) entitled "An Act for the preservation and repair of the National Road in Ohio, and for the collection of tolls thereon" has the following section:

"The proper limits of said road are hereby defined to be a space of eighty feet in width, forty feet on each side of the center of the graded road bed."

In a very interesting history of the old National Road through Maryland, Pennsylvania, Ohio and Indiana in the Ohio Archaeological and Historical Society Publications, Vol. 9, page 405 at pages 436 and 491, as well as in the appendix, will be found much that clearly establishes that the National Pike from Wheeling west through Ohio was established and originally constructed with a roadway eighty feet in width. The same records show that the road was eighty feet in width throughout its length in the state of Ohio.

The road was not actually constructed by the federal government beyond a point a short distance west of Springfield, the balance of the road in Ohio having been constructed by the state or the counties through which it passed.

The court has no difficulty in arriving at the conclusion from the evidence introduced, showing ancient records and plats, as

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well as the enactments of Congress and the Legislature of the State of Ohio, that the National Road east of Springfield, past the plaintiff's property was originally eighty feet in width.

It is, however, claimed by the plaintiff that his predecessors in title acquired the land by purchase from the government in 1811 prior to the enactment of the act of 1820 establishing the width of the road as eighty feet, and that the government having parted with this in 1811, could not in 1820, by legislative enactment, establish the width of the road as eighty feet.

It appears that Andrew and John W. Edgar, on October 10, 1811, purchased the northeast quarter of Section 35, Town 6 Range 9, Champaign county, Ohio, which includes plaintiff's land and that the entry was assigned to Elnathan Bond, and that the final survey was issued by the government on March 23rd, 1825. The patent was issued October 22nd, 1825.

The court is of the opinion that the Act of 1820 reserved to the government for road purposes through the land of the plaintiff a strip eighty feet wide and that plaintiff's title to this land must be referred to the date of its patent, to-wit, 1825.

Bagnell v. Broderick, 38 U. S. 436; *Wilcox v. Jackson*, 38 U. S. 498; *Bronson v. Kupuk*, Federal Cases 1929.

Of course, at the time of the issuing of the patent the exact location of the road was not determined but it sufficiently appears that the road was as a matter of fact constructed in its present location in about the year 1833 and that while the entire strip of eighty feet never was used for actual traffic that as a matter of fact it was cleared of brush and undergrowth to that extent.

However, it appears that the plaintiff's fence for the last fifty years has been less than forty feet north of the center line of the road and it may be claimed that the plaintiff has acquired by adverse possession the right to so much of the roadbed as lies north of the fence, which has for a period of much more than twenty-one years been within the line of the road as originally established.

The case of *Heddleston v. Hendricks*, 52 O. S., 460, effectively disposes of any such question. It is there held:

“The right of an adjacent land owner to enclose by a fence, however, constructed, a portion of a public highway can not be acquired by adverse possession however long continued.”

Wright, J., in the case of *McClellan v. Miller*, 28 O. S., 488, says:

“When roads are laid out and travel is limited necessity may not require that the whole width should be opened when a less quantity answers every purpose, but the fact that a portion of the highway remains in the possession of adjoining owners is merely a matter of sufferance from which rights can not accrue.”

An abundance of authority is cited in the case of *Heddlestone v. Hendricks, supra*, to sustain the position that the plaintiff in this case can not acquire a right to a portion of the road as originally established for road purposes by adverse possession.

This brings us to a consideration of a more difficult question. The petition of the plaintiff seeks an injunction against the contemplated act of the defendant, which is the owner of a line of telegraph wires, in moving its line northward upon the lands of the plaintiff. It is alleged in the petition that the present line of wires is twenty-eight feet from the center line of the road and that the defendant company intends to move them northward seventeen feet. If the present location of the poles is twenty-eight feet from the center of the road and the defendant intends to move them seventeen feet still further north they would then be placed at a point forty-five feet from the center of the road, which is clearly within the property line of the plaintiff, even though the road is conceded to be eighty feet in width.

However, at the trial it was not urged that the telegraph company intended to move its poles beyond a point forty feet from the center line of the road, but it appeared that the new position of the poles was to be such that the cross-arms would not be extended beyond a line forty feet from the center of the road.

Whatever may be the right of the state to improve the road to a point forty feet north of the center line for the purposes of travel we can not lose sight of the fact that this is an action to enjoin the telegraph company from encroaching upon the plaintiff's rights.

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It is claimed by the state that the government having in the act of 1820 reserved the entire width of eighty feet for road purposes and that the state became the successor to the government no rights at all within the eighty-foot strip.

However, it appears to the court that the provisions of the act of 1820 that so much of the lands of the United States as may be included within the contemplated road shall be reserved and excepted from the sales of public lands and that the road shall be eighty feet wide, does not exempt this road from the law governing other public highways of the state of Ohio. The government patented to the plaintiff's predecessors in title the fee to this land subject to the road thereafter to be established and whatever rights abutting property owners have in the public highways belong to the plaintiff.

In the case of *Daily v. State*, 51 O. S., 348, it is said by Spear, J., on page 356:

"Whatever may be the rule in other states we have supposed that the question of the right in the right of way of a landowner, whose title extends to the center of the road, is not an open one in Ohio. The question has been the subject of adjudication in a score of cases decided by this court (citing cases)."

Gilmore, Chief Justice, delivering the opinion in *R. R. v. Williams*, 35 O. S., 168, is quoted at length to the effect that as between the public and the owner of the land upon which a common highway is established, it is settled that the public has a right to improve and use the public highway for the purposes contemplated at the time it was established; that the public has a right to improve the road to make it convenient and safe for its use for the purposes of travel in the customary manner of locomotion of man and beast and by vehicles drawn by animals. Such constitutes an easement which the public acquires by appropriating the land for the right of way for a highway. The fee of the land remains in the owner.

The public has a right of passage and the right to improve and use the highway in a manner and for the purposes contemplated at the time it was established, but the abutting owner has a right to all the uses of the land not inconsistent with this right of passage and improvement. He has a right to cultivate and raise

crops on so much of his side of the highway as is not actually used for travel and has a right to plant and raise and enjoy trees and a right to the herbage and may graze his cattle thereon and may maintain trespass against others infringing on such right.

As to a country highway, while the public has the right of improvement and uninterrupted travel, the abutting owner has a right to all the uses of the land not inconsistent with its right of travel.

The right of the public is for road or street purposes and is limited to such control as is necessary to accomplish these purposes. As to country highways that object is accomplished ordinarily by securing free passage for travel and reasonable maintenance and repairs.

Many cases can be cited in Ohio where it has been held that the use of a portion of a public highway by corporations, such as telegraph, telephone, electric light or interurban companies imposes an additional burden upon the highway and infringes upon the private rights of the adjacent owners, and that the appropriation of the public highway for such purposes is a new one.

The fact that this use of the public highway may be sanctioned by some public body having such highway within its control does not permit such corporation to infringe upon the rights of the abutting property owner by the imposition of additional burdens. The ordinary burdens of a highway to which an abutting owner must submit include only those that are of a public nature and are incident to the ordinary and usual burdens borne by a highway, and when a private owner seeks to burden further the highway with its property and uses the same in the conduct of its business, the owner is protected against such encroachment by the Constitution and his rights may be taken only after proper compensation has been made to him, either by contract with the owner or by appropriation proceedings.

It is said in the case of *Daily v. State, supra*:

“Whatever grant of right in the highway is given telegraph companies as against the public, no right is permitted to be given them as against individuals. The question of legislative power to authorize a telegraph company to take the interest of adjoining land owners in the highway without compensation need not be considered.

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“It follows that before the telegraph company could possess a right in such measure as to interfere with the right of the land owner in the highway, it would be required to acquire that right in the some one of the ways known to the law.”

The court to sustain his views needs only to refer to the following cases without commenting upon them: *Cincinnati R. R. v. Cummins*, 14 O. S., 523; *Lawrence R. R. Co. v. Williams*, 35 O. S., 168; *R. R. Co. v. Telegraph Assn.*, 48 O. S., 390-426; *Daily et al v. State*, 51 O. S., 348; *Callen v. Electric Light Co.*, 66 O. S., 166; *Schaff et al v. R. R. Co.*, 66 O. S., 215; *Kellogg v. Traction Co.*, 80 O. S., 331, and the cases therein cited and commented on. See also, Longdorfs' Notes, pp. 546, 901, 903, and the cases therein cited and commented on.

The plaintiff in his petition has alleged that the defendant telegraph company is about to move its poles to a point where they would injure the property rights of the plaintiff. The fact that the defendant telegraph company has for a long period of time maintained its poles in such a portion of the highway as did not interfere with the plaintiff's property does not now permit the telegraph company to impose a new and different burden upon the plaintiff's property rights in the road by moving its poles to a point where they will be a further and additional burden upon the plaintiff's rights on account of its interfering with that portion of the highway now enjoyed by the plaintiff and not required by the state for highway purposes. It is not denied that the state may have the right to compel the plaintiff to permit it to use all the land within the eighty foot strip for highway purposes, but the state has no right to order plaintiff to submit to a new and additional burden sought to be imposed upon him by the telegraph company, merely because the poles of the telegraph company as now placed interfere with the contemplated improvement of the highway. If by reason of the new use being made of the highway the telegraph poles become an obstruction to traffic such that the state requires their removal, the telegraph company must, by contract or condemnation, acquire the right to place an additional burden upon the plaintiff's property right in the highway.

The plaintiff has a right to prevent the telegraph company from placing a new and additional burden upon his land and the state can not by its order give to such company the right to appropriate the plaintiff's land without compensation.

Whatever grant of right may be given to the telegraph company as against the public, no right can be given to it as against an individual. Before the telegraph company can possess the right to interfere with the right of landowner in the highway it must acquire that right in some way known to the law.

It may be said that the telegraph company does not seek to appropriate any of the property of the plaintiff. The term "property" as used in the constitution should have such liberal construction as to include every valuable interest which can be enjoyed as property and which is recognized as such. The right of the landowner to the use of the highway, subject to the use of the public, is property and as such is protected by the constitution, and any attempt by a private corporation to invade that right by the erection of its poles which are in any appreciable degree interfering with the full enjoyment of the landowner in the road is a taking of such property and must be upon the terms prescribed by the constitution. The matter involves the question of the right of the landowner to enjoy his property and the court is not required to determine whether the impairment of such right will be much or little. If it is appreciable in character and amount the plaintiff is entitled to relief.

Prayer for permanent injunction granted.

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**LIABILITY FOR FAILURE TO GIVE CHILDREN OF SCHOOL AGE
PROPER EDUCATIONAL ADVANTAGES.**

Common Pleas Court of Hamilton County,
Division of Domestic Relations.

IN RE MARTHA G. HARGY AND HARRY E. HARGY, JR.

Decided, December, 1920.

*Parent and Child—Extent of the Education which Must be Provided
for Children—Right of School Authorities to Require Vaccination—
Nature of the Offense Involved in Refusal to Permit Children to be
Vaccinated with Consequent Deprivation of School Advantages.*

1. The court construes Section 1645, General Code, as requiring parents to provide their children with a proper education, which means an education substantially equivalent to that furnished by the public schools.
2. Boards of education may exclude children from the public schools for non compliance with existing rules and regulations relating to vaccination.
3. While the parents of children thus excluded are not liable to prosecution under the compulsory education act, such exclusion can not be pleaded as an excuse for failure to provide their children with the education required by the statute. Children so deprived of school advantages may be declared "dependent," and any person causing or contributing to such dependency is liable to prosecution therefor.

John Weinig and Harry R. Weber, counsel for petitioner.

*Nelson Cramer, Julius Samuels and Arthur Gordon, counsel
for Harry E. Hargy, Sr.*

HOFFMAN, C. W., J.

On December 2, 1920, a petition was filed in the Juvenile Court by a resident and citizen of Hamilton county, charging Martha G. Hargy and Harry E. Hargy, Jr., minors of the age of eight and ten years, respectively, with dependency; in that by reason of the neglect and conduct of their father, Harry E. Hargy, Sr., they are prevented from receiving a proper education.

This action is brought under that provision of the juvenile court act, designated in the General Code as Section 1645. This section is as follows:

“Dependent child defined. For the purpose of this chapter, the words ‘dependent child’ shall mean any child under eighteen years who is dependent upon the public for support; or who is homeless or abandoned; or who has not proper parental care or guardianship; or who begs or receives alms; or who is given away or disposed of in any employment, service, exhibition, occupation or vocation contrary to any law of this state; who is found living in a house of ill fame, or with any vicious or disreputable persons or whose home, by reason of neglect, cruelty or depravity on the part of his parent, step-parent, guardian or other person in whose care it may be, is an unfit place for such child; or who is prevented from receiving a proper education because of the conduct or neglect of its parents, step-parent, guardian or other persons in whose care it may be; or whose environment is such as to warrant the state, in the interest of the child in assuming its guardianship.” (99 O. L., 193, as amended May 27, 1915.)

The particular clause of the section under which the children mentioned in the petition are charged as being dependents is that which defines a dependent child as one “who is prevented from receiving a proper education because of the conduct or neglect of its parents, step-parent, guardian or other person in whose care it may be.

That the state is the ultimate guardian of all children within its borders who need aid, protection, care, training and education, and that the state as *parens patriae* can assume the duties that have been neglected by the parents or natural guardians is a principle grounded in early English law and recognized in all chancery courts, both English and American, through the intervening years to the present day.

The common law enumerated the duties of parents toward children as being that of maintenance, protection and education, although the duty of providing an education was considered usually as a moral rather than a legal obligation. The sanctions, however, upon which these duties and obligations of parents were supposed to be founded were so slight that previous

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to the enactment of the juvenile court codes, there was "no effective control on the part of the community over the exercise of the parental rights and the performance of parental duties," and children were deprived of maintenance, support and especially education, when their interests were in conflict with the individualistic ideas and interests of their parents.

That the state has the power to provide that if the parents neglect to give their children a proper education, they may be superseded by the *parens patriae* or common guardian of the community, is disclosed in the opinion of Chief Justice Gibson, in the case of *Ex Parte Crouse*, 4 Wharton, 9 (Pa.) (1838):

"May not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right, the business of education belongs to it. That parents are ordinarily entrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held as they obviously are at its sufferance? The right of parental control is a natural, but not an inalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation."

Statutes similar to that of Section 1645 of the General Code and now under consideration have been enacted in a majority of the states of the Union and their validity and constitutionality have been confirmed by the courts.

In an opinion of the Supreme Court of Pennsylvania it is stated that:

"Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority, and performance of parental duty, is but a recognition of the duty of the state as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated." *Commonwealth v. Fisher*, 213 Pa. St., 48.

In the case of *Ex Parte Sharp*, 15 Idaho, 120, the Supreme Court of Idaho, in referring to the juvenile court act, says:

"Its object is to confer a benefit both upon the child and the community in the way of surrounding the child with better and more elevating influences, and of educating and training him in the direction of good citizenship, and thereby saving him to society, and adding a good and useful citizen to the community. * * *

"It would be carrying the protection of 'inalienable rights' guaranteed by the Constitution, a long way to say that that guaranty extends to a free and unlimited exercise of the whims, caprices or proclivities of either a child or its parents or guardians, for idleness, ignorance, crime indigence, or any kindred dispositions or inclinations."

In the opinion in the case of *In Re Janurewski*, 196 Federal Reporter, 123, the statement of Judge Sater in respect to Section 1644 of the General Code defining a delinquent child, and also in respect to the purpose and object of the juvenile court act, is applicable as well to Section 1645 relating to dependent children:

"The purpose of the statute is to save minors under the age of seventeen years from prosecution and conviction on charges of misdemeanors and crime, and to relieve them from the consequent stigma attached thereto; to guard and protect them against themselves and evil minded persons surrounding them; to protect and train them physically, mentally and morally. It seeks to benefit not only the child, but the community also, by surrounding the child with better and more elevating influences and training it in all that counts for good citizenship and usefulness as a member of society. Under it, the state, which through its appropriate organs is the guardian of the children within its borders, assumes the custody of the child, imposes wholesome restraints, and performs parental duties, and at a time when the child is not entitled either by the laws of nature or of the state to absolute freedom, but is subjected to the restraint and custody of a natural or legally constituted guardian to whom it owes obedience and subjection. It is of the same nature as statutes which authorize compulsory education of children, the binding of them out during minority, the appointment of guardians and trustees to take charge of the property of those who are incapable of managing their own affairs, the confinement of the insane, and the like. The welfare of society requires and justifies such enactments. The statute is neither criminal nor penal in its nature, but an administrative police regulation."

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It is evident from the decisions in the cases cited and the decisions in many other cases of like character and import, that the principle is firmly established that "the community and not the parent has the power to determine when the interests of the child are being ignored and inadequately protected."

In this state it has been determined, by virtue of Section 1645 of the General Code, that the interests of the child are being ignored when he is prevented from receiving a proper education because of the neglect or conduct of his parents.

A proper education from the viewpoint of the state is that course of instruction given in the common or public schools. The ordinance of 1787 declared that religion, morality, and knowledge were essential to good government and that schools and means of education should be encouraged. Acting on this warrant the Legislature in 1826 passed the first act establishing free schools in Ohio.

From 1826 to the present time this act has been followed by statute upon statute defining proper education in terms of the courses of study and instruction to be given in the common schools, and which the state deems necessary for its security and welfare. Insofar, therefore, as the juvenile court representing the state is concerned, the term "proper education" as used in the statute may be defined as that education which is of like character and equivalent to that provided by the state through the medium of common schools.

The evidence in this case reveals that from November 23, 1920, to December 3, 1920, the children mentioned in the petition did not attend a public, private or parochial school. The evidence further discloses that at the time of the hearing of this cause the child Martha G. Hargy was enrolled in the Elmwood public school and receiving the usual course of instructions prescribed by law. The child, Harry E. Hargy, Jr., however, is receiving no education of any kind. It is true that the father testifies that "he has made efforts to have his child educated at home by his mother in the rudimentary subjects," but the evidence clearly discloses that such instruction, if it may be so designated, as he is receiving in the home does not approximate as nearly as the circumstances and conditions of both the child and Harry E.

Hargy, Sr., warrants, the instruction provided by the public schools. In fact the statements of the father and the evidence clearly show that he is a man of good moral character and desirous of providing his child with a proper education and possibly in the near future will do so, but at the time of the hearing no effort was being made by him in this respect.

In defense of this action, which, as stated, has for its purpose that of establishing the status of the children mentioned in the petition as "dependents" on the ground that they are not receiving a proper education, the father states that previous to November 22, 1920, his children attended the Mary Dill public school, at Carthage, within the school district of the city of Cincinnati; that on that date they were excluded because of not presenting a certificate of vaccination in accordance with the rules and regulations of the board of education of the city of Cincinnati, which provides that children who do not present certificates of vaccination, or are not vaccinated when found to be fit subjects by the physicians of the school, unless suffering from certain specific diseases, may be excluded from admission to the public schools until there is compliance with such orders.

That boards of education may make such rules and regulations and enforce them even to the exclusion of children from attendance at the public schools has been definitely decided by the Supreme Court of this state in the case of the *State, ex rel Milhoof v. Board of Education of the Village of Barberton*, 76 O. S., 297, the syllabus of which is as follows:

"Section 3986, Revised Statutes, authorizing and empowering the board of education of each school district, 'to make and enforce such rules and regulations to secure the vaccination of, and to prevent the spread of smallpox among the pupils attending or eligible to attend the schools of the district, as in its opinion the safety of the public require,' is a valid enactment, not repugnant to the Constitution of the state of Ohio, nor violative of the Fourteenth Amendment of the Constitution of the United States. And under the power thereby conferred, boards of education in the exercise of a sound discretion, may exclude from the public schools all children who have not been vaccinated.

"The enactment of said statute by the General Assembly was but a reasonable exercise of the police power of the state; un-

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der its provisions, the validity of the action taken by the board of education in excluding from the public schools all children who have not been vaccinated, or who do not furnish a physician's certificate excusing them from vaccination, does not depend upon the actual existence of smallpox in the school district or community, nor upon an apprehended epidemic of that disease.

"Whether a rule or regulation adopted by the board of education under favor of the provisions of above Section 3986 is a reasonable rule or regulation is to be judged of in the first instance by the board of education, and the courts will not interfere unless it is clearly shown that there has been an abuse of official discretion."

It is clear that under the law, as stated in this case, the board of education of the city of Cincinnati did not transgress its powers or infringe upon the legal rights of the parents of the Hargy children, or of the children themselves when the board of education excluded them from the public school.

The father, however, contends that inasmuch as his children have been thus prevented by law from attending the public school, that this relieves him from the duty of giving them a proper education in accordance with the juvenile court act as interpreted by this court.

This contention again is no more than a denial of the power of the state, irrespective of the existence of public schools, to supersede natural parents and as *parens patriae* assume the guardianship of all children which the state by statute deems in need of aid, protection and education. As stated in the case of *Commonwealth v. Fisher, supra*, in discussing the juvenile court act:

"The act is but an exercise by the state of its supreme power over the welfare of the children, a power under which it can take the child from its father and allow it to go where it will, without committing it to any guardianship or institution, if the welfare of the child, taking its age into consideration, can be thus best promoted."

The state of Ohio, in the exercise of its supreme power over the welfare of children, has declared in Section 1645 of the

General Code that children who are deprived of a proper education by reason of the neglect or conduct of its parents shall become wards of the state. That the state at tremendous cost and expense provided common schools for the purpose of assisting the parents in giving children a proper education, and of which the parents may avail themselves on compliance with all lawful rules and regulations, in no way nullifies the power of the state to demand that all children receive a proper education even though the parents by their acts deprive themselves, with impunity, of the facilities offered by the state.

It can not be questioned that if the state were to repeal all laws providing for public schools, nevertheless it could demand that children receive a proper education. These laws in effect by act of the father, have been repealed in the present instance so far as the father of the Hargy children is concerned, but the state in the exercise of a power firmly grounded in both English and American jurisprudence can still demand that he give his children a proper education under the penalty, if it may be so called, of having his children declared dependent. The following cases heretofore mentioned confirm this doctrine. *Ex Parte Crouse*, 4 Wharton, 9; *Commonwealth v. Fisher*, 213 Pa. State, 48; *Ex Parte Sharp*, 15 Idaho, 120; *In re Janurewski*, 196 Federal Reporter, 123.

If a child is adjudged dependent on the ground that he is prevented from receiving a proper education because of the conduct or neglect of its parents, any person who has contributed towards such dependency may be prosecuted under Section 1654 of the General Code, which section is a part of the juvenile court act, and is as follows:

“Penalty for abuse or aiding and abetting delinquency. Whoever abuses a child, or aids, abets, causes, encourages or contributes toward the dependency, neglect or delinquency as herein defined of a minor under the age of eighteen years, or acts in a way tending to cause delinquency in such minor, shall be fined not less than ten dollars, nor more than one thousand dollars, or imprisoned not less than ten days nor more than one year or both. Each day of such contribution to such dependency, neglect or delinquency shall be deemed a separate offense. * * *

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Under this section a parent can not be prosecuted for not sending his child to a public, private or parochial school. That he has not sent his child to such schools when they were available to him might be introduced in evidence in some cases for the purpose of proving neglect and conduct that contributed to the child's dependency. However, if a child be excluded from the public, private or parochial schools because of his not being vaccinated and his father has not availed himself of the privileges of these schools or refuses to do so because of the requirements of vaccination, this in itself is not such neglect or conduct that would subject him to prosecution under Section 1654 for contributing to dependency.

In the present case the father of the Hargy children is not prosecuted under Section 1654 for not sending his children to a public, private or parochial school, nor for contributing to their dependency on the ground that he has not permitted his children to be vaccinated. The statute does not oblige him to send his children to these schools or compel him to have his children vaccinated, but irrespective of the fact that the privileges of the schools have been denied him, the statute still imposes the duty upon him to give his children a proper education, and on his failure to do so he may be prosecuted under Section 1654 for such neglect.

In the case of *State v. Turney*, 12 C. C. (N. S.), 33, the Circuit Court held that:

“A parent who sends his child to a public school and is willing to continue to do so, but the child is excluded for failure to comply with a rule of the board of education requiring vaccination, is not liable to conviction under the compulsory education act.”

It will be observed that this case, taken in connection with the case of *State, ex rel, v. Board of Education*, 76 O. S., 297, determines conclusively that when children are not vaccinated the rights and privileges of the schools may be withdrawn, and that when such rights and privileges are withdrawn and children are excluded from the schools the parents are not liable under the compulsory education act.

A board of education may exclude from school a child not vaccinated, but if excluded for that reason a parent can not be prosecuted for failing to send the child to that school under the compulsory education act. In other words, the parent surrenders the privilege of sending his child to a public school; insofar as he is concerned the public schools do not exist. This, however, does not lessen his duty to give the child a proper education such as enjoined by the state in pursuance of its supreme power over the welfare and education of children, and on his failure to do so he is liable under Section 1654 for contributing to dependency.

By way of summarizing the conclusions of the court are as follows:

1. That under Section 1645 a parent must provide his child with a proper education, which education shall be substantially equivalent to the education provided by the common schools.

2. That boards of education may exclude children from the public schools upon non-compliance with its rules and regulations concerning vaccination.

3. That parents of the children thus excluded are not liable to conviction under the compulsory education act.

4. That the parents of the children thus excluded can not offer such exclusion as an excuse for failure to provide the children with a proper education as required by Section 1645.

5. That if children are excluded from the public schools on non-compliance with regulations relating to vaccination they may be declared dependent under Section 1645, if they are prevented from receiving a proper education, as herein defined, because of the neglect or conduct of their parents.

6. That any person who causes or contributes towards the dependency of a child who has been deprived of a proper education as the statute sets forth is liable to conviction for causing or contributing towards dependency under Section 1654 of the General Code.

In the present case the evidence showing that Martha E Hargy is attending the public schools, this cause so far as it relates to her is dismissed.

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In respect to the child Harry E. Hargy: while the court finds that at this time he is not receiving a proper education and might lawfully be declared dependent, yet it appears that at the time of the filing of the petition his father, Harry E. Hargy, Sr., had neglected this duty for eight days only and at the time of the hearing expressed his desire to give his child a proper education. In view of these facts it appears to the court that the state would not be justified in superseding the parents and making provision for the child's education, until it is conclusively shown that the said Harry E. Hargy, Sr., intends to persist in his present line of conduct and neglect his duty to give his child a proper education.

This cause, therefore, in respect to the child Harry E. Hargy, Jr., will be continued to the 14th day of January, 1921, his father being given the opportunity in the meantime to provide for giving his child a proper education which in this instance shall be equivalent substantially to that provided by the common schools.

In the event that on or before January 14, 1921, it be found that the said child, Harry E. Hargy, Jr., is receiving a proper education as herein stated, this cause will be dismissed; otherwise on that day the child will be declared dependent and thus made a ward of juvenile court.

**CONSENT TO SETTLEMENT FOR A WRONGFUL DEATH CAN NOT
BE WITHDRAWN BY PROBATE COURT.**

Common Pleas Court of Clark County.

**JOHN T. BRAGG, ADMR., &c., VS. THE OHIO ELECTRIC
RAILWAY COMPANY.**

Decided, February 1, 1920.

*Jurisdiction—Not Vested in Probate Court to Withdraw Consent to
Settlement for Wrongful Death—Setting Aside of Release a Pre-
requisite to Action for Damages—Cancellation of Release and Ac-
tion for Damages Joinable.*

1. When the probate court, under Section 10772, General Code, upon the application of a personal representative of a decedent, has consented to a settlement with the party claimed to have wrongfully caused the death of such decedent and where in pursuance of such consent the personal representative has settled for such wrongful death, such court has exhausted its power in giving its consent and can not at a subsequent date render void the agreement by withdrawing the consent already given under which the administrator entered into a valid contract of settlement.
2. In an action for damages the defendant may plead in bar a settlement made with the consent of the probate court.
3. Where a settlement and release has been plead by the defendant, the plaintiff, by reply, may aver such facts as may make the release void, but if such release is not void but only voidable, the plaintiff can not maintain his action until the release is set aside.
4. A cause of action for the cancellation of a release and a cause of action for damages may be joined in the same petition.

Zimmerman & Zimmerman, for the plaintiff.

Paul C. Martin and Homer Cory, for the defendant.

GEIGER, J.

The plaintiff as administrator of Rosa Bragg brings an action against the defendant to recover on account of the death of the decedent due to the alleged wrongful acts of the defendant.

The defendant filed an answer in bar setting up the fact that on the 26th day of November, 1918, the plaintiff as administrator

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made an application to the probate court of Montgomery county, Ohio, for authority to settle the claim growing out of the death of the decedent under the provisions of Section 10770 G. C., and alleged that the probate court of Montgomery county made an entry upon such application, in which it is ordered that the administrator be authorized and directed to accept \$367 in full settlement of the claim arising out of the death of the decedent and that he execute to the defendant a release. It is alleged that in pursuance to and in accordance with the order of the probate court the plaintiff, as administrator, in consideration of the payment of \$367 executed his release to the defendant from all liability growing out of the accident resulting in decedent's death and agreed that such release should operate as a complete satisfaction and bar to every right of action against the defendant.

To this answer in bar the plaintiff filed a reply admitting that the application was made in the probate court of Montgomery county, as alleged in the answer, and that an entry was filed as alleged, but the reply further alleges that on December 24th a motion was made in said probate court to set aside said proceeding in settlement on the ground that the said settlement was not for the best interests of the husband and child and that the administrator was not advised of the law and that a full statement of facts was not presented to the court and for various other reasons not in conformity with the due administration of justice; that upon the hearing in said court said settlement was set aside by the court and an entry filed, a copy of which is set out in the reply, a part of which is—

“The court, being duly advised in the premises, orders and decrees that said sum of money so paid by the railway company be returned to said railway company, and sustains said motion, to which ruling said railway company excepts.”

The plaintiff alleges that he tendered the money to the defendant and upon its refusal to accept the same, it was deposited in court.

To this reply a demurrer is filed by the defendant on the ground that the proceedings of the probate court, set forth in

the reply, were without jurisdiction and void and that the reply does not constitute a reply to the defendant's answer.

Both parties have filed extensive briefs in the matter and the court has been in some doubt as to a correct determination of the question raised.

The court is of the view that we must first resort to the section of the statute requiring that the administrator must secure the consent of the probate court before he can settle a claim for wrongful death.

Section 10772 G. C. provides, among other things:

"Such personal representative, if he was appointed in this state, with the consent of the court making such appointment, may at any time, before or after the commencement of the suit, settle with the defendant the amount to be paid."

The administrator, in pursuance of this statute, made application to the probate court of Montgomery county asking for authority to settle the claim for the sum of \$367. The court, by its entry of November 26th, upon said application, authorized the administrator to accept the same, which the administrator did. The question now is whether the probate court had jurisdiction to make the order of December 24th set out in the reply, vacating the order of November 26th set out in the answer.

It is claimed by the defendant that the probate court, being of limited jurisdiction, had no power to set aside its former order upon which both parties had acted and in pursuance of which the claim had been settled.

It is claimed on behalf of the plaintiff that even though the court may not have had authority to legally set aside the order, that having jurisdiction of the cause of action and the parties, it had jurisdiction to vacate the order, and that the defendant would be required to secure a modification of that order by proper proceeding in the court of common pleas to reverse the judgment of the lower court. citing the case of *Mansfield v. Cole*, 16 N. P. (N. S.), 209, where it is held that—

"As the court had jurisdiction of the subject matter, the decree of December 29th was not void, but merely voidable,

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and an appeal would lie from such decision or judgment to the court of common pleas, where the same might have been reversed.”

It must be clear that the probate court, having limited jurisdiction, has no right in an original action to set aside a contract.

The administrator is authorized by Section 10772 to settle with the defendant, provided he secures “the consent of the court.”

It is quite clear that if the plaintiff had been acting as an individual, settling his own claim for damages, and had made a valid settlement with the defendant that such settlement would be a bar to the present action.

Section 10772 seeks to safeguard the rights of the estate by first requiring the consent of the court to such settlement, where the party injured has died as a result of the injury. The settlement itself is made not by the court but by the administrator in his representative capacity and the instant it has been consummated, with the consent of the court, it is as binding and final as if it had been made by an individual in the settlement of his own right of action. The court has exhausted its power in giving its consent and cannot at a subsequent date render void an agreement by withdrawing the consent already given, which enabled the administrator to enter into a valid contract.

While it is true that courts of common pleas, as a general rule, may vacate or modify judgments decrees or orders during the term in which they were made and may, on proper application being made under the provisions of Section 11576, vacate a former verdict, report or decision during the term, upon proper motion being filed within three days, and may, under the provision of Section 11631, vacate or modify its judgment after the term, upon proper showing, it does not follow that a probate court may withdraw a consent given in an *ex parte* proceeding to a settlement that an administrator is empowered to make as soon as such consent has been secured.

The case of *Johnson, Exr. v. Johnson*, 26 O. S. 357, indicates

the limitation upon a probate court to vacate orders made in *ex parte* proceedings, pointing out that the section controlling a court of common pleas, above cited, affects only cases in which there are adverse parties.

See also, *Kinsella v. DeCamp*, 15 C. C. 494; *Mansfield v. Cole*, 16 N. P. (N. S.), 209; and *Darling v. Darling*, 85 O. S., 27.

The court is of the opinion that a settlement having been made, it is a good defense to the cause of action, unless such settlement and release may be attacked on some proper ground. On that point the case of *Perry v. O'Neil Company*, 78 O. S. 200, is of interest. It is there held that in a cause of action for damages the plaintiff may, by reply, aver such facts as may make the release void, but that if such release is not void, but only voidable, the plaintiff cannot maintain his action until the release is set aside. It is further held that a cause of action for the cancellation of a release of damages and a cause of action for damages may be united in the same petition.

If, in the case at bar, the release plead was void for any reason, the plaintiff may set up such facts in his reply. If the release was not void but only voidable he would be required to have such release set aside first, before proceeding to trial of the action for damages, but he may join in the same petition an action to cancel the voidable release and his action for damages.

Demurrer sustained.

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OFFERS FOR THE PURCHASE OF MUNICIPAL BONDS.

Common Pleas Court of Lucas County.

ARTHUR T. BEEL, DOING BUSINESS UNDER THE TRADE NAME OF A.
T. BELL & COMPANY, v. PLANT CITY, A MUNICIPALITY IN
THE STATE OF FLORIDA.*

Decided, October 7, 1920.

Bids for Bonds Offered by a Municipality—Terms and Conditions of Sale and Purchase Found in the Offer of the Purchaser as Accepted by the Seller—Rather than as Expressed in the Advertisement for Bids—"Legality" of an Issue of Bonds—Includes the Security Offered as well as Compliance with Legal Formalities—Disposition of Check Deposited as Liquidated Damages in Case of Breach on the Part of the Bidder.

1. Where a municipality by advertisement invites bids for an issue of bonds, and a bidder in his offer states conditions which vary somewhat from those embodied in the advertisement for bids, and his offer is accepted, by the municipality, the contract of sale is found in the letter of the purchaser, rather than in the advertisement for bids, insofar as the offer of purchase differs from the conditions named in the advertisement.
2. The requirement made by a purchaser that the municipality shall furnish evidence of the legality of the proposed issue "to the satisfaction of our attorney," permits the attorney to take into consideration not only the legal formalities attending the issue, but also the security afforded by the proposed obligation; and the bidder may refuse to accept the bonds where his attorney has reported that because of a limitation on the tax rate and the present valuation of property subject to taxation by the municipality when considered in connection with the amount of bonds already outstanding, "it appears doubtful whether the proposed issue could be paid at maturity.
3. Forfeiture will be denied of a certified check given by the bidder to the municipality to be applied in part payment of the bonds on delivery, or "returned to us on demand should we not be awarded the bonds or should our attorney not approve of their legality," or to be "applied by you as full liquidated damages in case we refuse to carry out the terms of this bid. On the contrary, in the absence of any showing of fraud or collusion between the bidder and his attorney, an order will be made for the surrender or cancellation of the check.

*Affirmed by the Court of Appeals.

Marshall & Fraser, for plaintiff.

E. L. Peters for defendant.

Some time prior to February 2, 1920, the city of Plant City, Florida, advertised that it would receive bids for an aggregate par value of seventy thousand dollars (\$70,000.00) of paving bonds of the municipality, and in the advertisement said: That each bid must be accompanied by a certified check in the sum of two per cent. of the amount of the bid to secure the city from any loss, resulting from failure of the bidder to comply with the terms of the bid, and that if the terms of the sale were not complied with and the successful bidder did not accept the bonds and pay for them within sixty days after their award, the city reserved the right to declare the sale forfeited and the bidder's certified check forfeited to the city.

A. T. Bell & Company submitted a bid in writing, as follows:

"For \$70,000.00 6 per cent. paving bonds dated Dec. 1st, 1919, denomination \$1,000, interest payable semi-annually, both interest and principal payable at some bank in N. Y. City of your selection, principal maturing 20 years after date without option of prior payment, we will pay \$71,286 and accrued interest from date of bonds to date of delivery to us. We will take up and pay for bonds in current funds within 5 days after approval.

"Prior to delivery of bonds to us and promptly after awarding of same, you are to furnish us with a full and complete certified transcript of all proceedings necessary to evidence the legality to the satisfaction of our attorney.

"We enclose herewith certified check for \$1,500 which check is to be held by you and applied in part payment for the bonds on date of delivery to us, returned to us on demand should we not be awarded the bonds or should our attorney decline to approve the legality of same, or applied by you as full liquidated damages in case we refuse to carry out the terms of this bid."

This bid was accepted by resolution of the council and a few days afterwards a certified transcript of the proceedings had, including the validation of the bonds under the Florida law, was sent to A. T. Bell & Company, who thereupon transmitted the same to a bond attorney in Chicago, for his opinion. It developed that this attorney was ill at the time, and about the middle

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of March, A. T. Bell & Company requested the return of the transcript because of the attorney's inability to pass on the same.

On receiving the transcript again A. T. Bell & Company forwarded it to Chester B. Masslich, a well known bond attorney of New York, who on April 10th, transmitted to A. T. Bell & Company his opinion on the same, in which he declined to approve the issue of bonds for the particular reason that because of a limitation on the tax rate in the special charter of Plant City, as applied to the present valuation of property there, considered together with the amount of bonds of the city already outstanding, it appeared doubtful if the proposed issue could be paid at maturity.

Thereupon A. T. Bell & Company notified Plant City that it refused to accept the bonds and demanded the return of the certified checks in the sum of fifteen hundred dollars deposited under the terms of the bid.

In the meantime, on April 5th, the council of Plant City had declared the fifteen hundred dollars deposit forfeited because of the failure of the bidder to take up and pay for the bonds within the sixty-day period specified in the advertised notice to bidders.

Thereafter Plant City caused these certified checks to be deposited for collection.

A. T. Bell then brought suit in the Court of Common Pleas of Lucas County, Ohio, against Plant City, and garnished first the amount of the certified checks in the hands of the bank on which these were drawn, and later the checks themselves.

Plant City then filed an answer. A. T. Bell & Company took leave to and did file an amended petition, in which they asked for injunctive relief as well as damages. To this Plant City filed an answer, substantially the same as before, stating that the opinion of Mr. Masslich was not made in good faith but only for the purpose of releasing the bidder, and further that Mr. Masslich's objection, being only to the security for the bonds, had nothing to do with their legality.

The case was tried to the court, the evidence introduced being almost entirely documentary and consisting of the notice to bid.

der, the bid itself, its acceptance and the correspondence between the various parties.

The defendant offered no evidence whatsoever to substantiate the charges made against Mr. Masslich.

JOHNSON, J.

At the conclusion of the argument to the court by the respective counsel for plaintiff and defendant, the court announced to counsel that, owing to the difficulty of retaining in mind the testimony which had been presented to it in the hearing, it would prefer, unless serious objection were made by counsel, to dispose of the case at once; for these reasons as well as the facilitating the final disposition of the case on appeal, if appeal should be made. No objection being made, the court said (orally):

Now, gentlemen, as I understand this action the plaintiff filed the petition against Plant City, and in the original petition a claim was made for a money judgment. Attachment and garnishment were issued and to the petition an answer was filed. Thus the defendant appears in court. The defendant having been brought into court, the plaintiff filed an amended petition. An answer has been filed to the amended petition and thus the issues arise between the parties, both being personally present and within the jurisdiction of the court.

The evidence shows that certain checks were issued by the plaintiff and deposited with the city clerk of Plant City, Florida. The deposit was made upon terms and conditions that arose by an invitation on the part of the city for bids, the filing of a letter with the clerk and an acceptance afterwards by the clerk; the acceptance, however, came from the clerk of the city and thus from the city. The letter of acceptance was of the date of February 2d, 1920: which was the date fixed by the city authorities through their ordinance, at which bids would be received and were received, for the bond issue which the city proposed to market.

After the lapse of sixty days, the city deposited these checks to its credit. They came through the ordinary commercial channels to the Guardian Trust & Savings Bank in Toledo. They

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were there at the time the original action was commenced. I presume, then, that it is a matter of indifference whether that fund be treated as an outstanding obligation in the form of a certificate of deposit, or as a credit with the Guardian Savings Bank Company. The relief which is sought is equitable in its nature, and the consequence is, that in this action, a jury having been expressly waived, the court exercises its jurisdiction as a chancery tribunal.

The first question in the record, and it seems to me the primary question, is where are the terms of this contract to be found? In the first place, they are to be found in the documents which are here in the record itself. Counsel for defendants asserts that the contract arose upon the proposal in the advertisements and notices of the bond sale by the city, which appear in the transcript, and the submission of the letter of February 2d by the plaintiff together with the deposit of the checks. The plaintiff contends that the terms of the letter do not follow precisely the terms of the ordinance, but contain a new proposal, and that whatever obligation arose between the parties arose from the fact that the authorities of the defendant accepted the proposal of the plaintiff with reference to these bonds, and that a contract of sale thereby existed in the terms of the letter and the acceptance by the defendant of the offer of the counter proposition made by the plaintiff to Plant City. It is apparent upon an inspection of the two papers that the terms of the printed ordinance and of the letter of the defendant are not identical. The letter of the defendant is not a categorical acceptance of the proposal contained in the advertisement. The letter says, "We will take up and pay for bonds in current funds within five days after proposal." There is nothing of that sort in the advertisement. The letter says: "Prior to delivery of bonds to us and promptly after awarding the same, you are to furnish us with a full and complete certified transcript of all proceedings necessary to evidence the legality to the satisfaction of our attorney."

Those terms are not in the original proposition. The city accepted by an endorsement upon this letter: "The above bid duly

accepted by resolution of city council passed February 2, 1920." It is quite apparent then, that the contract of the parties is that which arose by reason of the proposal of the plaintiff to the defendant, and not by the proposal of the defendant to the plaintiff.

The circumstances leading to the submission of this bid are relevant circumstances, tending to show the circumstances and conditions surrounding the parties. But the creation of the obligation took place when this proposal of the plaintiff to the city was accepted by the city. The question then becomes whether or not the term "for sixty days" is applicable. There is nothing of this in the proposal, nor does the term in the advertisement carry that element into this. The ordinance providing for the issuing of the bonds, and after the passage of the ordinance public notice thereof was given by advertisement which attracted the attention of the bidders. Applying the act of the defendant in reference to the checks to the terms of the bid, we find that these checks were deposited for a specific purpose. The city became the holder by virtue of the terms on which the plaintiff deposited these checks, viz: to be "returned to us on demand should we not be awarded the bonds." (They were awarded). Then follow words in the alternative, viz: "or should our attorney decline to approve the legality of same, or applied by you as full liquidated damages in case we refuse to carry out the terms of this bid..." The city must then claim the checks as part payment for the bonds awarded upon the bid, and there is no evidence that such application has been made, nor does the evidence disclose that the checks were applied as liquidated damages. The city has no right to penalty or to liquidated damages until those have been established. The defendant has neither pleaded nor proved facts showing such established right. The city has no right at the expiration of sixty days to declare a forfeiture. No court of equity will recognize a forfeiture. A court of equity will recognize a stipulation for liquidated damages, but the action of the city for the collecting of these checks by forfeiture will be stayed until its rights further appear.

Now this course of reasoning alone would leave the city still with a qualified property in these checks and a right to hold

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them as outstanding legal obligations. It becomes necessary to determine whether or not the city, under the situation that has developed subsequent to the bids, is entitled to proceed against the plaintiff for liquidated damages for a breach of the contract which was entered into between them. That, in turn, requires that we consider and find what is intended by the parties by the terms "legal" and "evidence the legality to the satisfaction of our attorney." I notice, in a Kansas case, the judges have turned lexicographers and undertake to make definitions. But the purpose in every case is to penetrate the ideas which underlie the action of the parties and upon which they have agreed in their transactions and to ascertain them through the veil of words which falls over their ideas. Mr. Masslich has expressed his opinion on the meaning of these terms, and he seems by his opinion to consider that his duty required him to refuse his approval. He says: "I regard inability to enforce payment, if that inability is caused by anything in the law, as a matter upon which my opinion could not be silent." It was within his province to consider the matters which he has passed upon in his letter of April 10th. The evidence clearly shows reasonably prompt action on the part of the bidder, the plaintiff here, to secure an opinion as to the validity of these bonds. The bidder had a right in good faith to choose his authority, viewing the market for his securities. Upon the submission to his attorney, the attorney was of the opinion that the matter was within his province. His opinion has been made one of the terms of the bid: "to the satisfaction of our attorney." Therefore the parties intended that the opinion of counsel selected in good faith should be deemed to be involved within the term "legality" as used by the parties and as within the meaning of this term of their contract. The bond issue was, in his opinion, imperfect.

Counsel for defendant contends that "legality" signifies a perfection of the procedure which has been followed in creating the bonds which have been issued. In this case the opinion of the attorney shows that the proceedings have been substantially in compliance with the statutory regulations—those formal proceedings which are necessary to be followed in order that the

bonds shall be valid expressing of an obligation. But I assume that "legality" means something more than the mere formality of issue. It means the expression of a perfect obligation. It means that the bonds shall not be merely the expression according to legal form, perfect in its intonation and following all the regulations but that the result of these formalities shall be the creation of an obligation on the issuing of those securities that is perfect so that the buyer shall have no concern about the security returning both his income and investment. That, therefore, involves the construction of the entire law that relates to the obligation. In the opinion of counsel in this case the limitations which the laws of Florida fix upon a municipality are such that in this instance there is an imperfect obligation. That is precisely the question intended to be submitted to him; so that he has given to the purchaser an opinion of the profession with regard to the security that the obligation created. Now it matters not that these bonds could be pursued to a judgment. You may have as many judgments as you can get, but only one satisfaction. It is not the ability to secure a judgment, but it is the perfection of the security of the investment by virtue of the statutory provision for payment, which constitutes its legality. Here counsel, in good faith and true to their client, have given their opinion that they should not approve the bonds. In the pleadings the defendant alleges that there was fraud and a confederation and conspiracy between the plaintiff and his counsel. There is no evidence of this. This being denied in the reply, the burden is upon the defendant to show by a preponderance of evidence in its favor and the ordinary rule is that the proof shall be clear, and as counsel say, convincing; but of this there is not the slightest evidence. On the contrary, the uncontradicted evidence is that Mr. Masslich is an attorney of high standing and national reputation.

It follows from this that the plaintiff is entitled to a permanent injunction restraining the paying over of this fund and restraining the defendant from seeking to enforce it. I am not sure whether the prayer of the petition is for cancellation and surrender of these certificates. If it is, cancellation will be decreed, it being within the jurisdiction of the court.

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Purnhagen v. Industrial Commission.

**DETERMINATION AS TO WHETHER DEATH OCCURRED
IN THE COURSE OF EMPLOYMENT.**

Common Pleas Court of Hamilton County.

**NELLIE PURNHAGEN V. THE INDUSTRIAL COMMISSION OF OHIO
ET AL.**

Decided, October Term, 1920.

*Workmens' Compensation—Slight Variance in Performance of a Single
Duty—Not a Bar to Recovery for Accidental Death.*

Compensation will not be denied under the workmen's compensation act, on the ground that the decedent did not meet his death within the scope of his employment, where his digression from the usual method of procedure consisted in going to call upon a customer as a guest in an automobile instead of using the horse and delivery wagon with which he had been supplied by his employer.

Frank H. Kunkel and Oliver G. Bailey for plaintiff.

Louis H. Capelle, Prosecuting Attorney, Albert Leeker, Assistant Prosecuting Attorney, and Benton S. Oppenheimer, et al. defendants.

DIXON, J.

On October 24, 1918, Richard Purnhagen, an employee of the Jung Brewing Company, was killed in Cincinnati while riding in an automobile with one, George Menges, who was also an employee of the said company; said automobile having skidded on the slippery street and crashed into the adjoining curb, causing said Purnhagen to be thrown to the roadway, whereby he sustained injuries resulting in his almost instant death.

Purnhagen's widow, Nellie Purnhagen, filed a claim for compensation with the Industrial Commission of Ohio, but the Commission denied her right to participate in the workmen's compensation fund upon the ground that her husband's death did not arise out of or in the course of his employment. From this decision Nellie Purnhagen appealed to this court, and the evi-

dence was heard by a jury. At the conclusion of all the evidence both sides moved for an instructed verdict and thereupon the case became automatically one for the court to decide.

The sole question in the case is whether or not Richard Purnhagen, the decedent, met his death while engaged in the course of his employment as an employee of the Jung Brewing Company. Counsel on both sides have each submitted a rather comprehensive synopsis of the evidence adduced at the trial, and a perusal of both statements discloses little, if any material difference in the analysis of the testimony. It is undisputed that the decedent, Richard Purnhagen, was at the time of his death, and had been for many years prior thereto, employed by the Jung Brewing Company as a solicitor and collector for draught beer, and that on the day he met his death it was his duty to call upon and make a collection from one, George Puls, a saloon keeper whose place of business was located in Madisonville, and who was both a draught beer and a bottle beer customer of the brewery. Toward noon on the day in question Purnhagen called at the saloon of Campbell & Ording, located on Madison road near Torrence ave., where the brewery sold bottled beer, and while there he received word over the telephone from one of the officials of the brewery, that Menges who delivered bottled beer for the brewery by horse and wagon, had neglected to supply this same George Puls at Madisonville, with bottled beer on the day previous, as it was his duty to do, and that Puls had sent in a complaint to the brewery. Menges was due to arrive at Campbell & Ording's saloon very shortly after Purnhagen received this message, and he decided to wait for him before going to Madisonville, some three or four miles further out, to collect from Puls. When Menges arrived at Campbell & Ording's saloon, he learned of Puls, complaint, and thereupon he and Purnhagen arranged with Campbell & Ording to allow Menges to have enough bottled beer from the supply which Campbell & Ording had on hand to tide Puls over until such time as the brewery could send him the amount desired. Instead of taking this beer out to Puls in his beer wagon, Menges claiming that his horses were too tired to make this long trip at the close of

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their day's work, sent his team and wagon back to the brewery stables, secured his own automobile, put the boxes of bottled beer into the automobile, and together with Purnhagen and another person, went to the place of business of Puls in Madisonville. Here the bottled beer was delivered to Puls from the automobile, and Purnhagen made his collection, receiving from Puls a check which was found on his person after his death. After a short stay in Puls' place of business, Purnhagen started back to the city with Menges in the automobile over the only direct route that could be used for that purpose. Madisonville is in the extreme eastern part of Cincinnati, while the brewery is located in the middle west-end of the city, and Purnhagen's residence was in the extreme west-end on Price Hill. The automobile was wrecked and Purnhagen was killed about five o'clock in the evening, on Madison road near Vista avenue, a point in the return route over which it was necessary for Purnhagen to pass in the automobile regardless of whether he was returning to the brewery or going direct to his home.

Counsel for the Commission contend that inasmuch as the brewery had furnished Purnhagen with a horse and buggy for use in making his collections in the city of Cincinnati, and did not specifically authorize him to use an automobile for such purposes, that he could not under any circumstances ride in an automobile while engaged in his employers' business; and that because he did so under the circumstances of this case he grossly violated his duty to his employer and departed entirely from the course of his employment.

In this contention we can not concur; nor can we bring ourselves to believe that in the light of the construction that has been placed upon the Ohio workmen's compensation law by the various courts of this state, it is necessary that there should exist a reasonably anticipated causal connection or relationship between the injury and the employment before the provisions of the act will become operative in any specific case.

The reported cases in Ohio, many of which are found in the briefs submitted by counsel, and to which we are compelled to look for guidance in this case, do not warrant any such conclu-

sion. Such a construction if adopted generally, would in our judgment, practically nullify the humane purposes of the act and relegate the injured working man in Ohio to a position with respect to his legal rights, in which his chances of obtaining compensation would be only slightly better than they were under the uncertain rigors of the common law.

The course which our courts should pursue in cases involving a construction of our compensation act is clearly and definitely outlined by Nichols, C. J., in *Industrial Commission v. Pora*, 100 O. S., wherein he says:

“The real spirit of the act is to measurably banish technicality and to do away with the nicety of distinction so often observable in the law, and commands a liberal construction in favor of employees.”

It is clearly apparent from the evidence adduced in the case at bar, that Purnhagen, the decedent, was something more than a mere draught beer solicitor and collector. He was a faithful and trusted employee who had been in the service of the brewery for many years; he was a sort of general outside man who looked after many matters of interest to his employers, and he appeared at all times to be eager and ready to render services of a business nature whenever and wherever he could; he was undoubtedly called upon at times to use, and did use his own judgment and discretion in transacting business for his employers, and was not in fact, nor was he expected to be a mere automaton, mechanically performing day after day, and week after week, the same unvarying kind of work. On the day he met his death he was due to call on George Puls in Madisonville, and make a collection from Puls, who was waiting for him and was ready to and did pay him when he came. What time he arrived in Madisonville was immaterial as he was not running on any particular schedule, and was not due to go there at any particular time. It is well known that men employed as beer collectors for breweries spend more or less time in the places of business of their customers, and that their employers are aware of this custom and for business reasons encourage it. We therefore believe that neither the length of time which Purnhagen spent in Campbell

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& Ording's saloon, nor the fact that he might have gone to Madisonville earlier in the day by street car or otherwise, is in any wise germane to the merits of the plaintiff's claim. In any event he learned while in this saloon that George Puls, his customer in Madisonville and a patron of his employers, had been neglected the day before by another employee of the brewery, and had complained to the brewery of this treatment. What could be more natural under these circumstances than that a faithful employee such as Purnhagen undoubtedly was, should immediately become interested from the viewpoint of his employer, the brewery, in Puls predicament. Puls was undoubtedly incensed because he was without an adequate supply of bottled beer, and Purnhagen was eager to satisfy him and remove any cause for dissatisfaction he might have against the brewery. Purnhagen's employer, because of its failure to make due delivery to him of what he needed; and this the more so because on that very afternoon it was Purnhagen's duty to call on Puls and collect for goods previously sold and delivered by the brewery.

To accomplish this two-fold purpose Purnhagen elected to go to Madisonville in an automobile with the man whose primary duty it was to deliver the beer to Puls; and if his mission on this day had not ended so fatally he would in all probability have been commended by his employers for his alertness and enterprise in looking after their business welfare. In making use of the automobile Purnhagen did not adopt any uncommon or hazardous means of conveyance; on the contrary he selected what is today the most commonly used means for private carriage, and in so doing we do not believe he placed himself outside the scope or course of his employment.

We therefore hold that his death occurred while he was returning from an errand on which he had gone in the line of his duty as an employee of the Jung Brewing Company, and while he was within both the scope and course of his employment, and that his dependants are entitled to compensation for his death in accordance with the provisions of the workmen's compensation act.

ADOPTION OF PAPER IN WILL BY REFERENCE.

Common Pleas Court of Columbiana County.

JEPHTHA G. MILLER, AS EXECUTOR OF THE ESTATE OF LAURA LOUNSBURY, DECEASED, v. CORA L. MACKENZIE ET AL.

Decided, October Term, 1920.

Wills—Adoption by Reference of Letter of Instructions not in Existence at Time of Execution of the Will not Effective.

1. The will itself must refer to a paper to be incorporated as being in existence at the time of the execution of the will, and in such a way as to reasonably identify such paper in the will, and in such way as to show testator's intention to incorporate such instrument in his will and to make it a part thereof.
2. Such document must, in fact, be in existence at the time of the execution of the will.
3. Such instrument must correspond to the description thereof in the will and must be shown to be the instrument therein referred to.

Lodge Riddle, for plaintiff.

No counsel for defendants appeared.

MOORE, J.

Laura Lounsbury died June 11, 1920, leaving a last will which was duly admitted to probate in the probate court of Columbiana county, on July 1, 1920. Jephtha G. Miller was duly appointed executor thereof. The will was executed May 20, 1916.

Item 3rd of the will is as follows:

“Third: I give, devise and bequeath all the remainder of my property real and personal (except such articles as are otherwise disposed of in my letter of instructions to Mrs. Miller, who is to distribute them according to instructions) to my nieces Cora Mackenzie, Mrs. J. G. Miller, Mrs. H. T. Glapp, Mrs. Garry Dunn and my nephews Harry MacLane and Ed. MacLane to be equally divided among them all.”

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Miller, Executor, v. Mackenzie.

After the death of said Laura Lounsbury her said will and the following letter were found among other papers in her safety deposit box in the Firestone Bank, Lisbon, Ohio.

Said letter was in a sealed envelope addressed on the outside thereof to Cora Mackenzie, Mrs. H. T. Clapp and Mrs. J. G. Miller.

The following is a copy of said letter:

“March 16, 1920.

“Dear Girls. This is the last request I will make of you. Now I want to tell you my wishes. You three, Cora, Minnie and Nettie, are to have the contents of the house to divide between you, only Dorothy Petty is to have the old secretary, as she will value it more than any wife of Mackenzie Miller would.

“The blue and white quilt is to be Dorothy Petty’s, too, as it is the last one I pieced. If you want to give anything to the MacLanes you can do so, though you girls come first (as they were so many years that they drifted away). The house is not to be sold at a loss, and when sold the money is to be divided among all the heirs. Cora is to have my wrist watch, if she hasn’t one. If either of you three girls die before I do, her share of Union stock is to be divided between the two remaining.

“My jewelry you can divide as you like, it is not valuable only for association.

“Laura Lounsbury, Lisbon,
“Margaret Meister,
“Nannie Baker.”

Said Margaret Meister and Nannie Baker, it is admitted, signed said letter as witnesses only.

In Page on Wills, Section 162, pages 183, 184 and 185, and cases there cited, it is said:

“A will may by reference incorporate into itself as completely as if copied in full, some other paper which, in itself, is not a will for lack of execution.”

“In order so to incorporate three things are necessary:

“1. The will itself must refer to such paper to be incorporated as being in existence at the time of the execution of the will, and in such a way as to reasonably identify such paper in the will, and in such way as to show testator’s intention to incorporate such instrument in his will and to make it a part thereof.

"2. Such document must, in fact, be in existence at the time of the execution of the will.

"3. Such instrument must correspond to the description thereof in the will and must be shown to be the instrument therein referred."

It will be noticed that said will was executed May 20, 1916, and said letter is dated and was executed March 16, 1920. So that said letter of instruction was not in existence at the time of the execution of said will. The will refers to a letter of instructions to Mrs. Miller. The letter found and described in the petition was addressed on the envelope to three persons, one of them being said Mrs. Miller, and the letter itself is addressed to "Dear Girls." There are no words in the will in terms making said letter a part of the will, or stating that the letter is to be considered as a part thereof.

Therefore, said letter of instructions not being in existence at the time of the execution of said will, and not reasonably identified as the paper described in the will, and no language of the will stating the same shall be considered as a part of the will, the court is of the opinion that said letter of instructions referred to in said petition, is not and should not be considered as a part of this will, and the true construction of said item third of said will is as follows: "Third. I give, devise and bequeath all the remainder of my property, real and personal, to my nieces Cora Mackenzie, Mrs. J. G. Miller, Mrs. H. T. Clapp, MacLane, to be equally divided among them all."

Mrs. Garry Dunn and my nephews Harry MacLane, and Ed.

And a decree may be taken accordingly.

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NEW CROSSINGS OF RAILWAYS AT GRADE.

Court of Common Pleas of Trumbull County.

THE CITY OF WARREN V. THE N. Y., P. & O. R. R. Co. and THE
ERIE RAILROAD COMPANY.*

Decided, March 21, 1919.

Appropriation of Railway Right-of-Way for a Grade Crossing—Public Convenience as Distinguished from Public Necessity in the Matter of Crossings—Future Requirements of the Railway as well as of the Public Must be Considered—Policy of the State with Reference to New Grade Crossings.

An action does not lie under the present statute for the appropriation of so much of a railway right-of-way as would be required to extend a street over the company's tracks, and for an order for a grade crossing at that point, when the evidence goes to show that the benefit to the public from the proposed crossing would be small, the increased burden which it would cast upon the railway would be serious, the location perilous for a grade crossing because of obstruction of the view, and that a crossing at that point would be one of convenience rather than of necessity.

R. D. Leffingwell, City Solicitor, and *D. R. Gilbert*, for plaintiff.

Gilmer & Gilmer and *J. Paul Lamb*, contra.

COLE, J.

The city of Warren by proper legislation determined to appropriate that portion of the defendant railroad company's right-of-way contained within the limits of Paige avenue if extended across the railroad tracks in the northeasterly part of the city. It then brought action under Section 3677 *et seq.*, G. C., to assess the compensation due the railroad companies by reason

*Appeal dismissed by the Court of Appeals, September 19, 1919.

of such appropriation, and also by proper averments in the petition asking for an order for a grade crossing at the place where the appropriation is made under the provisions of Section 8897 *et seq.*, G. C.

The right to maintain a single action for the determination of both of these objects seems to be settled in the case of the *C. & P. R. R. Co. v. City of Martins Ferry*, 92 O. S., 157, in which the court discussed the question quite fully.

In appropriation cases by municipalities the general rule is that the appropriation is complete when the proper legislation has been made by council; but in cases where it is sought to appropriate a portion of the right of way of a railroad company, a very important preliminary question must be determined by the court. This question relates to whether the appropriation will unnecessarily interfere with the reasonable use of the property so crossed by such improvement. See G. C. 3677, Sub. 1; *P. C., C. & St. L. Ry. Co. v. City of Greenville*, 69 O. S., 497; *C. & P. R. R. Co. v. City of Martins Ferry*, 92 O. S., 157.

While this preliminary question necessarily comes before the court, it is also made the subject of the fourth defense in the answers of the defendant companies and the issue on the same is joined by the reply of the city.

The allegations of the petition for the establishment of a grade crossing are also denied by the answer, although this is possibly not necessary. The evidence offered in the trial relates solely to these two questions and from the nature of the case the evidence is in a large degree applicable to each situation. In passing on the matters it has seemed convenient to first determine the application for a crossing at grade.

This railroad was constructed in about 1863 when the city was no larger than some villages and the territory in and around the proposed crossing largely covered with timber and wholly without the limits of the municipality. In fact it is only within the last few years that it became incorporated within the city limits. Owing to the rapid growth of the city within a comparatively short time, caused in part probably by the increased industrial activities of the country at large, the shipping facilities of Warren, and other local causes, the city has increased from about

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twelve thousand population in 1910 to approximately twenty-eight thousand at the present time. It is said to have doubled its population in the last five years. Industrial plants, attracted by cheap locations and railroad facilities, have sprung up along the railroads and quite a number are located along the defendants railroad on both the north and south side, and others are located to the north and east of the proposed crossing along the line of the Pennsylvania company. Most of the employees in these industries now live south of defendants' railroad and are obliged to cross its tracks in going to and from work, some of them crossing at the Pennsylvania tracks about six hundred feet east of the proposed crossing, others at Park avenue about twenty-three hundred feet west, and some at the proposed crossing.

The city acquired the land to extend Paige avenue from Dana avenue on the south to Griswold street on the north, excepting the crossing in question, opened it up as a street and constructed sidewalks on the east side—the right-of-way being left upon. This action, no doubt, accounts in a large way for its present use, for it really constitutes an invitation for people to use that part where the sidewalk is and trespass on the railroad right-of-way over the remainder. The evidence varies as to the amount of use made of this crossing; from fifty or sixty to three hundred or more persons crossing in a day. No highway leads from the north end of the proposed extension into the country or to any present residence district, the houses in the vicinity and to the north being very few and scattered. Large tracts of land have been allotted north of Griswold street and between North Park avenue and the Pennsylvania railroad; but none of the streets in the allotments are dependent on the use of the proposed extension of Paige avenue. Nor would this extension shorten the distance materially from any of the territory on the north and east of the proposed crossing to the business center of the city, or to any of the railroad freight depots, except that of the Pennsylvania company. The traffic from this depot to and from any one of the several industries lying north and east is from three to four truck loads a week to three or four package deliveries within the same time.

It is further said in argument in behalf of the city that a good deal of pressure was brought to bear on the council by the owners of these allotted lands and proprietors of those industries to induce it to purchase the land for this extension, make the improvements now there and institute this proceeding for a grade crossing. The city further insists that within a very short time those allotted tracts of land will be built up into residence districts, where nearly all of the employees working in the factories and plants in that neighborhood will find their homes.

Park avenue is the main thoroughfare leading from the business section of the city north into the country and is located some 2,300 feet west of the proposed crossing. The streets laid out in the allotments above referred to are conveniently located for access to this thoroughfare. It is now the main artery of travel serving this territory and will probably continue to remain so.

If this should turn out to be true, and the court is of the opinion from the evidence that it probably will, the reason for establishing a grade crossing at this place would practically cease to exist, except for the small amount of freight above referred to.

The railroad company now uses its tracks from Park avenue to the Pennsylvania company's crossing, not only for its through train service, but also to serve the several industries located on its line and its connecting track with that of the Pennsylvania company. The evidence shows that there are from one hundred to a hundred and fifty train movements over this proposed crossing each day, with every probability that this will be largely increased in the near future, making all of this part of its right-of-way a railroad yard.

The railroad company claims that by reason of an ordinance regulating the speed of trains through the city to four miles per hour over street crossings, it would be impossible for it to perform its duties to the public and serve these industries, and observe the ordinance at the same time. If the ordinance continues this would probably be true; but it does not appear that any effort has been made to modify the ordinance. At least, there is no presumption that this ordinance will continue permanently.

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The evidence further shows that it is not possible to separate the grades at this point by a subway for the street to pass under the railroad because of a lack of drainage facilities; but an overhead structure spanning the right-of-way with a five per cent. grade is perfectly feasible, the cost would, however, be from fifty to sixty thousand dollars and wholly out of proportion to any benefit that could accrue to the city or those interested in the establishment of this extension, and would involve the city and the railroad company in an unwarranted expenditure of money.

It further appears that the railroad approaches this proposed crossing on a curve and that by reason of the buildings and other obstructions erected upon private land, the view to the approach of that crossing is very much interfered with, and that these obstructions would in all probability be increased in the future rather than diminished.

These are the most important facts disclosed in the evidence, and it is upon this showing that the city claims it has made out a case and shown such a necessity as will require the court to grant the prayer of its petition by establishing a grade crossing.

It is worthy of remark that no one in the case, either witness or counsel, has had a good word to say for such crossing. Every one recognizes the danger attending them. And all agree that it is only in case of a public necessity as distinguished from a mere public convenience that courts should act favorably on an application of this kind.

The policy of the state was declared in 1904, when it passed the act abolishing grade crossings at streets and highways. About the same time it further prohibited grade crossings by railroads crossing each other or crossings by street and interurban railroads over steam railroads at grade.

This railroad is bound to render service as a common carrier to all the public along its entire line with reasonable security and dispatch, taking into consideration such reasonable legislation as is required to accommodate each local public or city, and each city or local community must suffer such slight inconvenience in avoiding crossings over the railroad as will permit the railroad company to reasonably perform these duties. And it is

only when some real necessity of the local public arises for such crossing, as distinguished from a mere public convenience that warrants a court in finding that such proposed crossing will not unnecessarily interfere with the operation of the railroad if the improvement is made.

The court is of the opinion that the city has not made a case either for the establishment of a grade crossing at this point or one that will permit it to appropriate the right-of-way of the railroad company for a street. This being the conclusion of the court, the petition is dismissed at the costs of the city.

VALIDITY OF A CITY ANTI-INTOXICATING LIQUOR ORDINANCE.

Common Pleas Court of Stark County.

SOPHIA SILLA V. THE CITY OF CANTON.

Decided, September, 1920.

Constitutional Law—Municipal Ordinance Against Manufacture, Sale or Giving Away of Intoxicating Liquor—Not Invalid for Indefiniteness, When—Weight of Evidence as to Guilt of the Accused.

1. A city ordinance making it unlawful to manufacture, sell, furnish or give away intoxicating liquors for beverage purposes, is a valid enactment and constitutional.
2. A conviction by the trial court will not be reversed on error because the same may be against the weight of the evidence, unless it be found that it is manifestly so.

Loren C. Wise, for plaintiff in error.

Clarence A. Fisher, and *James E. Kinnison*, for defendant in error.

DAY, J.

This is a proceeding in error brought to reverse the criminal court of the city of Canton wherein a judgment was rendered

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against the plaintiff in error, who was charged with violation of a city ordinance for keeping a place of public resort where intoxicating liquors were possessed for beverage purposes.

At the outset I may remark that the court is not favored with the presence of Exhibit A, to-wit, the bottle and liquid therein contained. It is a grave question whether this petition in error might not be dismissed for the reason that the entire bill of exceptions is not before the court; however, in view of the fact that the matter was submitted at length, and without the question being raised, I deem it better to go forward and give my views without further comment as to the absence of Exhibit A.

There are eight grounds of alleged error set forth in the petition, but they may be grouped under two general heads: first, that the city ordinance itself is void for uncertainty and that a prosecution cannot be lawfully had thereunder; and second, that the judgment of the court below is against the manifest weight of the evidence.

The ordinance in question was approved March 30, 1920, and published according to law, and is known as Ordinance No. 4576 of the city of Canton. Said ordinance provides that it shall be unlawful to manufacture, sell, furnish, possess or give away intoxicating liquors for beverage purposes or keep a place where intoxicating liquors are manufactured, sold, furnished, possessed or given away for beverage purposes; and provided that it shall not be a violation of the ordinance to possess and give away intoxicating liquors in one's *bona fide* private dwelling, unless the place shall be a place of public resort; and provided further that nothing therein shall be so construed as to prohibit anything permitted or authorized to be done by the Constitution or laws of Ohio or by the Constitution or laws of the United States, relative to the traffic in intoxicating liquors.

It is urged that in the light of these negative averments and these provisions as to the Constitution of Ohio and the United States that this ordinance is uncertain, vague and indefinite. The construction of laws and ordinances require the courts to

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construe the language in the ordinary meaning of the English words and that all parts of the ordinance should be construed together and given force and effect.

I think, in the light of the accepted rules of construction, this ordinance is valid, and I see no uncertainty or indefiniteness or vagueness which interferes with its true intent and meaning, to-wit, to prohibit the sale, manufacture, possession, furnishing or giving away of intoxicating liquors for beverage purposes, or to keep a place where intoxicating liquors are manufactured, sold, furnished or possessed or given away for beverage purposes. I therefore reach the conclusion that, in the light of the plain intention of this ordinance, the first ground of alleged error is not well taken and the same is overruled.

An examination of the bill of exceptions discloses that, at the date and place in question, four officers visited the place of plaintiff in error, and as they came upon the scene they found a room which had formerly been used as a saloon, now being used as a place for the sale of soft drinks; that patrons and customers were using it as a place of public resort; that said customers were standing in front of the bar drinking and that the place was being conducted as a public drinking place. Immediately upon the officers coming into the saloon, the plaintiff in error, who was behind the bar, was holding a glass containing some light colored liquid; that she removed the same into the sink and turned on the water spigot. An officer rushed back of the bar, turned off the water and succeeded in collecting a certain amount of the liquid or liquor which had been in the glass that had not run out from the sink but had lodged in a low or concave space therein. This liquid was afterwards analyzed or submitted to tests by a chemist and found to contain 24 per cent. alcohol. The record further discloses that such beverage is an intoxicating liquor.

The plaintiff in error herself testifies in a vague, uncertain and indefinite manner through an interpreter and is supported by her husband who had formerly been convicted for violation of the liquor laws; the gist of their testimony being that plaintiff in error was washing a glass and that it did not contain intoxicating liquor.

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This is, in substance, what the record shows. Now the question for the court to determine is whether the judgment of conviction entered by the court is so manifestly against the weight of the evidence that the same should be reversed.

Commenting on the conflict of evidence in a criminal case, Judge Peck in *Breese v. State*, 12 Ohio St., 146-156 (80 Am. Dec. 340) said:

“The jury who try a cause and the court before which it is tried, have much better opportunities to determine the credibility and effect of the testimony, and we ought therefore, to hesitate before disturbing a verdict rendered by a jury and confirmed by a court, possessing such advantages, merely because there is an apparent conflict in the testimony.”

And the court in that case, held, that,

“A judgment will not be reversed because the verdict is contrary to the evidence, unless it is manifestly so, and the reviewing court will always hesitate to do so where the doubts of its propriety arise out of a conflict in oral testimony.

Applying the rule of law above stated to the evidence presented in this case, we find no sufficient ground to warrant us interfering with the verdict rendered.”

The court of appeals of this district laid down the rule for disturbing verdicts in a criminal case, in *Andy v. State*, 19 C.C. (N.S.), 93, 94.

“And as a reviewing court keeping in mind the rule that the verdict of the jury should not be set aside unless it is manifestly against the weight of the evidence, we are of the opinion that the record presents a case which does not require this court to interfere with the verdict of the jury on the ground stated.”

The court trying the case has the very great advantage of seeing the witnesses, hearing their testimony, observing their demeanor and reaching a conclusion upon not only the spoken words of the witness, but his manner of testifying, his appearance and his general conduct, all of which aid the court in reaching a conclusion as to what weight should be given his testimony.

Now, the rule in a criminal case is that the evidence should satisfy the mind of the trier with the guilt of the accused beyond a reasonable doubt before a judgment or verdict so finding could be lawfully rendered. The Supreme Court of Ohio has held that in human affairs absolute certainty is not always attainable and from the nature of things, reasonable certainty is all that can be attained upon many subjects. When a full and fair consideration of all the evidence satisfies the mind to a reasonable certainty of the guilt of the accused, it is the duty of the court to so find. Of course, whenever there is only a strong probability of the guilt of the accused, it is the duty of the court to acquit.

From a careful reading of this record I have reached the conclusion that while the evidence is conflicting as in all the cases, yet I cannot say that the rule of the Supreme Court as to reversing criminal cases will permit me to do aught else than to deny the petition in error on the grounds alleged,—that the judgment of the trial court is against the weight of the evidence.

The remaining ground of error is that the court sentenced the plaintiff in error as for a second offense.

An examination of this ordinance shows that the first offense may be punishable by a fine of not less than \$100 and not more than \$500; for a second offense by a fine of not less than \$200 and not more than \$500. It is true that the court used the phrase that he regarded the offense as a second offense because the husband had previously been convicted or had plead guilty to a similar offense prior to the date in the affidavit filed against the plaintiff in error.

The assessing of the fine against the wife in this amount may have been caused by the fact that the husband had theretofore been guilty of the same offense and that it was therefore in the nature of a second offense for this couple. Yet he had the lawful right under the terms of this ordinance to assess the fine of \$500 for a first offense, and the record therefore does not disclose that the court below transgressed the law in

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assessing a fine authorized by the ordinance. His conclusion was lawful even though his reasoning or mental processes may not have been so. The same cannot therefore be a ground of error.

Upon the whole record, I find no error which justifies the reversal of this judgment of the court below and the same is therefore affirmed.

PARTIAL DEPENDENCY UNDER THE WORKMAN'S COMPENSATION LAW.

Common Pleas Court of Hamilton County.

**DAISY HILL, NEXT FRIEND OF STANLEY KELLEY, A MINOR, ETC., V.
THOMAS J. DUFFY ET AL, ETC.**

Decided, January Term, 1921.

Workmens' Compensation—Delinquent Father Killed in the Course of His Employment—Dependency of Minor Children Where They Received no Support from Him—Partial Dependency Established.

A boy thirteen years of age, who received little or no aid from father and was supported in part through his own efforts and in part by his divorced mother, is entitled upon the death of the father by accident during the course of his employment, subsequent to the remarriage of the mother and leaving no other child under sixteen years of age, to receive two-thirds of the father's average weekly wage from the date of the father's death until the said child arrives at the age of sixteen.

George S. Hawke, Fulford, Shook & Wilby, for plaintiff.

Louis H. Capelle, Prosecuting Attorney, A. H. Leeker, Assistant Prosecuting Attorney, for defendant.

DARBY, J.

This is an appeal from the decision of the Industrial Commission refusing an allowance to the claimants, Stanley Kelley and Leslie Kelley, for compensation as dependents of Edward Kelley, who was killed October 8, 1917, while working for the Foundation Company, which was a contributor to the state insurance fund.

It is conceded that Kelley was killed in the course of employment, and the only question in the case is as to whether or not the claimants were dependent in whole or in part upon said Kelley at the time of his death.

He was their father; the mother had been divorced from him and had been awarded the custody of said children. Four days before Kelley's death, his former wife, the mother of the claimants, remarried, and at the time of his death Leslie, the youngest child, was actually living in the home of his mother and step-father.

The claim of Stanley, the older of the two boys, may be briefly disposed of. At the time of his father's death he was eighteen years of age, was and had been self-sustaining, and at that time was in the American Expeditionary Force in France. Quite clearly Stanley was not a dependent of his father at the time of the latter's death, and is not entitled to an award.

The question as to whether or not on the facts stated Leslie is entitled to an award is not without considerable difficulty. At the time his father died he was thirteen years and eleven months of age; he went to school until he was sixteen years of age, and has since become self-supporting. After the separation between Leslie's parents, the evidence is that his father, of age, and has since become self-supporting. After the separation the deceased, did not support him or contribute in any way to his support, except that he provided part of his clothing, and on one occasion gave him a pair of shoes. The boy worked on the farm during his hours out of school, for which he was paid nothing; his mother worked in a factory, and also received help from another son who was in the United States Navy; the evidence justifies the conclusion that the mother and her family were people of very moderate circumstances, though she received from her mother's estate some money at the time of her death in 1915.

The section of the code which must solve this question, is 1465-82:

"In case the injury causes death with the period of two years, the benefits shall be in the amounts and to the persons following:

"1. If there be no dependents, the disbursements from the state insurance fund shall be limited to the expenses provided for in section forty-two hereof (G. C., Section 1465-89).

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“2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wages, and to continue for the remainder of the period between the date of the death, and six years after the date of the injury, and not to amount to more than a maximum of thirty-seven hundred and fifty dollars, nor less than a minimum of one thousand five hundred dollars.

“3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wages, and to continue for all such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-seven hundred and fifty dollars.

“4. The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

“(A) A wife upon a husband with whom she lives at the time of his death.

“(B) A child or children under the age of sixteen years (or over said age if physically or mentally incapacitated from earning) upon the parent with whom he is living at the time of the death of such parent.

“In all other cases, question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee, but no person shall be considered as dependent unless a member of the family of the deceased employee, or bears to him the relation of husband or widow, lineal decendant, ancestor, or brother or sister. The word ‘child’ as used in this act (G. C. Secs. 1465-41a to 1465-43, 1465, 1465-46, 1465-53 to 1465-106), shall include a posthumous child, and a child legally adopted prior to the injury.”

Particular attention must be given to the latter part of the section.

The claimant, Leslie, is not within the class of those presumed to be “wholly dependent for support” upon the deceased, for the reason that he was not living with his father at the time of the death.

The section contains the following language:

“In all other cases, question of dependency, in whole or in part, shall be determined in accordance with the facts in each

particular case existing at the time of the injury resulting in the death of such employee.”

This is one of the “other cases,” for not only was the child not living with his father, but the father was not contributing to his support at the time of the death, and had not been so doing for years theretofore. It was suggested in argument that this case must be determined according to the fact of dependency, or not, at the time of the death. If this be true, clearly there is no claim for an award, because in fact Leslie was not dependent in the sense that he received any support, or had reason to expect any from his father. There is no question but that the father was under legal obligation to support this boy until he arrived at sixteen years of age; but it seems that the question of legal obligation to support can not alone solve this question.

Much reliance is placed in the case of *Musselli v. Industrial Commission of Ohio*, 28 O. C. A., 97; the syllabus in that case is as follows:

“The fact that one killed in the course of his employment had contracted a bigamous marriage does not bar his legal wife living in Italy from receiving benefits under the Ohio workmen’s compensation act, where there is no evidence that she had been other than a faithful wife.”

The facts in that case were that the deceased left his wife and child in Italy and came to this country in the year 1901; that correspondence was continued with the wife from time to time, and that the decedent sent her money at various times, the last about January of 1909; that the wife made two attempts to come to this country, but was refused the right of immigration, the last time being in 1908; that after the sending of the last money referred to, decedent married another woman and came to live in Ohio; that he spoke affectionately of his family in Italy, and intended at some time to return to his native country; that the husband was killed on or about December 1, 1913, while in the course of his employment by a company which was a contributor to the Ohio Insurance Fund; that the wife of plaintiff in this case was extremely poor, that she was dependent for her livelihood on labor in the fields, and that she had not remarried after

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the death of her husband. Her petition for allowance of compensation by the Industrial Commission was denied, she filed her petition on appeal, to which a demurrer was filed and sustained. The case was therefore in the Court of Appeals on error. In discussing the law applicable to the case, the court say on page 100:

“Let us first inquire what is meant by ‘dependent,’ as the word is used in this statute. The commonly accepted meaning of the word is, one who looks to another for support, help or favor.

“The crux of the case seems to center in the word ‘dependent,’ as used in the statute heretofore referred to. A wife is a natural dependent—a fact that is unversally conceded—and the dependency of the wife on the husband is continuous while the marital relation exists, unless by some act of herself or by operation of law such dependency ceases.”

On page 101, the court say:

“It must be conceded that the provisions of the law under review are wise and humane, and were enacted for the purpose of furnishing the means of support for the widows, children and dependents of employees who might lose their lives while engaged in some labor or work in an endeavor to obtain the means of support for those near and dear to them. This law is for the benefit of the dependents of employees, and in view of this fact how can it be claimed with any force that the surviving widow in the present case should be barred of her rights under the law because her husband contracted a bigamous marriage, *or because for a period of time he failed and neglected to send her money?* What act has she done or failed to do that should prevent her from receiving the benefits of this law. Are the wrongful, unkind, unfaithful acts and misconduct on the part of her husband to be charged against the dutiful wife and mother, thereby preventing her from reaping the benefits of the statute that was specifically enacted to take care of just such unfortunate persons? Certainly not.”

In the case last referred to, the judgment of the court of common pleas in sustaining the demurrer to the petition, was reversed, and the cause remanded to that court with instructions to overrule the demurrer to the petition.

In that case the wife lived in Italy and had received no support whatsoever from January, 1909, and during the rest of her husband's life, which terminated December 1, 1913, a period of almost five years. There was no more obligation on the part of the husband in that case to support his wife than the part of the husband in that case to support his wife that child. If the Musselli case is correctly decided, it would seem to be decisive of the case at bar; the same reasoning would sustain the award in this case as sustained the award in that case. In this case there was the helplessness of childhood, hard labor on a farm, and inadequate education; and if it be that this law was passed for the benefit of those who are entitled to the support of employees killed in the course of their employment, it would seem that an award should be made in favor of this child.

Upon the authority and reasoning of the Musselli case, it is the opinion of the court that Leslie Kelley is entitled to an award as a dependent of Edward Kelley, but not as one wholly dependent upon him. The statute providing for partly dependent persons at the time of death, authorizes the payment of "sixty-six and two-thirds per cent. of the average weekly wages, and to continue for all or such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-seven hundred and fifty dollars."

According to the evidence Leslie Kelley was thirteen years and eleven months of age at the time of his father's death, and has been self-supporting since he arrived at the age of sixteen, at which time he left school.

It is therefore the order of the court that the claim of Stanley Kelley be disallowed, and that the claim of Leslie Kelley be allowed at the rate of sixty-six and two-thirds per cent. of the average weekly wage of the deceased, from the time of his death until the arrival of said Leslie Kelley at the age of sixteen years.

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MALICIOUS INTERFERENCE IN BUSINESS MAY BE ENJOINED.

Superior Court of Cincinnati.

LOUIS HELLMAN ET AL V. THE RETAIL FURNITURE SALESMEN'S ASSOCIATION.

Decided, December 22, 1919.

Trade Disputes—Interference with Business—Methods Which are in Themselves Lawful or Unlawful—Malicious Interference—Coercive Measures not Permissible, When.

1. Malicious interference with the right of plaintiffs to carry on their business as may seem advisable to them, is a violation of plaintiff's constitutional rights to liberty and property and as such may be enjoined.
2. The existence of a trade dispute between the employer and employees or the elements of competition, whether between similar businesses or between capital and labor, will constitute a justification for interference, by means in themselves lawful, without regard to the existence of an intent to injure.
3. The fact that the defendants can not secure from *their* employers the advantage of Saturday night closing unless plaintiffs close also, will not justify the use of coercive measures to compel plaintiffs to close on Saturday evening nor the bannering of plaintiff's place of business as "unfair" where there is no trade dispute between plaintiffs and their employees.
4. A combination to carry into effect such bannering of plaintiffs' place of business and malicious interference with such business is an illegal conspiracy and may be enjoined.

Memorandum of decision on motion for new trial.

HICKENLOOPER, J.

This cause comes up for hearing on motion of the defendants for a new trial or, since the matter is in equity, for a re-hearing and reconsideration by the court of the legal questions involved in the previous decision of the court making permanent the temporary restraining order issued against the defendant association. This previous decision of the court was rendered from the bench and involves the right of the defendant association to picket the plaintiffs' place of business and exhibit in

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front of such place of business a printed banner reading "Louis Hellman & Co. Unfair to Retail Furniture Salesmen's Association."

From the pleadings and the evidence adduced at the hearing it appears that the defendant association is composed of about 55 of the retail furniture salesmen in the city of Cincinnati and was organized for the purpose of promoting the welfare of all furniture salesmen in the city, of which there are probably some 400 or 500. Shortly after the organization of the association a movement was started to bring about the closing of the retail furniture stores on Saturday evening and thus enable the retail salesmen to spend that evening of the week at home with their families. A petition was circulated among the proprietors and an agreement was signed by practically all of such proprietors whereby each agreed to close his store on Saturday evening at 6 p. m., "provided all other retail stores in the city of Cincinnati closed." The plaintiffs, Louis Hellman & Company, refused to sign this agreement alleging that they employed no salesmen after 6 p. m. on Saturday evenings, but that the business of the partnership was conducted personally by the partners and the members of their families.

Upon this refusal of Hellman & Company to co-operate with the Salesmen's Association and with the avowed intention of coercing the plaintiffs into closing their store, since their refusal jeopardized the plan of universal closing, the defendant Association placed an employee in front of the plaintiffs' store bearing the banner above mentioned. There was evidence that the display of this banner had caused several customers, who had come to make payments upon their accounts, to leave the vicinity without entering, and the only conceivable purpose of displaying such a banner is the establishment of a direct, if not a secondary, boycott and, by injury to plaintiffs' business to compel their acquiescence in the demands of the Association.

On behalf of the plaintiffs it is contended that the acts shown constitute an illegal conspiracy and that a court of equity may and should enjoin the same. On behalf of the defendants it is earnestly contended that the constitutional provisions guaranteeing freedom of speech and ensuring to the defendants the right to the pursuit of happiness necessarily ensure the right in the defendants to state their case to the public and to take

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all steps, lawful in themselves, which may result in bettering the condition of the members of their association; and if the business of the plaintiffs is injured by any such acts of the defendants, not in themselves unlawful, such injury is *damnum absque injuria*. The defendants further contend that in Ohio the existence of an intention to injure, or what is legally known as malice, can not make unlawful an act which is otherwise lawful, and that what an individual may lawfully do, does not become unlawful by reason of the fact that several have combined and agreed to act in unison. In other words, defendants contend that any act which an individual may lawfully do, he may request another to do and that he may secure from such others an agreement to this end. It is thus contended that if any one of the members of the defendant association may voluntarily abstain from patronizing the plaintiffs' business, by the same token they may agree together to abstain from such patronage and may request other individuals or the public at large, to abstain from such patronage, and that in so doing they violate no constitutional right of the plaintiffs.

At the very inception of the consideration of this case it must be noted that the same constitution of this State which, by Article I, Sec. 11, guarantees to the defendants the right to freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of that right, likewise guarantees to the plaintiffs the inalienable right of acquiring, possessing and protecting property, and of seeking and obtaining happiness, which latter right includes the right so to conduct their lives and business as may seem to them advisable just so long as such acts upon their part do not infringe the rights of another. It would seem that the right of the plaintiffs to conduct their business in any manner that may seem to them proper should not be limited or abridged more than is necessary by a similar constitutional right in the defendants to freely speak and publish their sentiments upon any subject. If possible, these two inalienable rights of different individuals should so far be harmonized or construed in harmony as to allow the maximum of liberty and the minimum of abridgement or limitation to each. The one provision may not, and can not, be given effect without taking into consideration, and like wise giving effect to, the other. We start therefore with this as the basis and shall seek

to determine in what manner the interests of both may be protected.

It might also be noted, as preliminary to the main discussion, that the word "unfair" as displayed upon banners, has acquired a highly specialized meaning, viz., that the employer, before whose place of business it is displayed, is conducting a non-union shop, or that he has a dispute with his employees as to compensation or working conditions which has not been adjusted, or that a strike is then in progress at such establishment. Inasmuch as there is no strike nor any dispute between the plaintiffs and their employees as to working conditions or pay, the use of the word "unfair" in this particular instance might be enjoined as misleading. *Steinert & Sons Co. v. Tagen*, 207 Mass., 394. This point is not, however, made a basis for the decision of the instant case since the dispute has been submitted to the court, and argued by counsel solely upon the broader question above stated.

The almost universally accepted definition of a conspiracy is that given in Anderson's Law Dictionary, viz.: "A conspiracy is a combination of two or more persons by some concerted action to accomplish a criminal or unlawful purpose or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means." And in *Lindsay v. Montana Federation of Labor*, 96 Pac., 127, this definition is quoted with the observation, in reference to boycott, that "it is the illegality of the purpose to be accomplished, or the illegal means used in furtherance of that purpose, which makes the act illegal." This court adopts the principle just stated as fundamentally sound and it shall therefore be our endeavor to determine whether the concerted action of the members of the defendant association, in which action they solicit the support and concurrence of the public in general, is either to accomplish a purpose, lawful, or even laudable, in itself by unlawful means; or to accomplish an illegal purpose by lawful means.

As above stated the avowed and only conceivable purpose of the defendants is to drive away customers from the plaintiffs' business and thus to introduce the element of coercion into their negotiations with the plaintiffs as to Saturday night closing. The question therefore resolves itself into a determination of whether this injury to the good will of plaintiffs' busi-

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ness is an *unlawful* interference with and injury to a property right; for, if so, the combination becomes an illegal conspiracy whether the unlawful act be considered as the ultimate purpose or merely as a means for the accomplishment of a purpose not unlawful in itself, viz: the betterment of the working conditions of the members of the defendant association.

“The injury to the plaintiff is an essential element of the defendants’ scheme, and whether the benefit to the defendants’ members be considered as the end of the combination, and the injury to the plaintiff one of the means used, or whether the injury to the plaintiff be considered the end and the strike the means, the result is the same. The concerted action is an illegal conspiracy.” *Albro J. Newton Co. v. Erickson* (1911), 126 N. Y. Supp., 949.

Having given the facts of this particular case and the authorities cited the most careful consideration the court has come to the conclusion that this combination to injure the plaintiffs’ business is an illegal conspiracy; first, because it is an injury to one of plaintiffs’ property rights, without justification; second, because it constitutes a restraint of trade; and third, because of the element of coercion which taints the whole transaction. We have also come to the conclusion that the wrong is one in respect to which a court of equity can and should afford a remedy by injunction and that the great weight of authority, both in England and in these United States, supports this conclusion. It is unnecessary to consider many of the authorities in detail, but in considering the general principles upon which our conclusions are based we shall cite and quote from enough of the cases to show the trend of modern judicial opinion upon the subject.

That the plaintiffs’ right to carry on their business in any manner that seems best to them, just so long as they do not infringe upon the rights of others, is a constitutionally guaranteed property right, would seem to be so well established as to require the citation of no authority to support it. “It seems strange,” says the court in *Loewe v. Cal. State Federation*, 139 Fed., 71, 79, “that in this state and this free country—a country in which the law interferes so little with the liberty of the individual—that it should be necessary to announce from

the bench that every man may carry on his business as he pleases; may do what he will with his own so long as he does nothing unlawful and acts with due regard to the rights of others." As was said also by Mr. Justice Hughes in *Truax v. Raich*, 239 U. S., 33: "It requires no argument to show that the right to work for a living in the common occupations of a community is the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

"A person's business, aside from the money, chattels, plant and other tangible property employed therein, is in every sense of the word property, and as such is if lawful, entitled to protection from all unlawful interference * * *." *Martin's Modern Law of Labor Unions*, Sec. 84.

Citations upon this point might be multiplied indefinitely but suffice it to say that in the present case the court is clearly of the opinion that the right of the plaintiffs to carry on their business in such manner as seems to them most advisable, provided it is done in a lawful manner and does not infringe upon the rights of others, is a well established and fundamental right, partaking, as the court observes in *Coppage v. Kansas*, 236 U. S., 1, both of the nature of a right to personal liberty (the pursuit of happiness) and of a property right. If this be so, is it a right which the courts will protect against malicious interference by others? Or, expressed differently, can an interference with and injury to this right, without justification and maliciously, be considered lawful? If such malicious and unjustified action on the part of defendants is considered unlawful then their combination, as above remarked, is to be classed as an illegal conspiracy.

As already stated, it is contended by the defendants that since there were no assault and battery, nor disorder, nor breach of the peace, and in fact, no violation of any penal statute, libel nor misrepresentation, that therefore the injury to plaintiffs' business is simply the result of doing what they have a lawful right to do and, as such, partakes of the lawful character of the means employed. This is clearly falacious. It loses sight of the distinction between the end and the means, the ultimate act and the intermediate acts. It may be entirely lawful for one to mix poison with food for the purpose of killing rats in

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one's barn, but if that act be performed as a step in a conspiracy to poison another person, the ultimate poisoning does not become lawful because there was nothing intrinsically illegal in mixing poison with food. Nor are we entirely satisfied that this case at bar would not come within the provisions of General Code, Section 12477, making criminal the malicious destruction of the property of another. It is possible that the Legislature might be held to have had in mind only the malicious destruction of *tangible* property but this has never been judicially established in this state and the cases in Ohio, apparently holding that malice can not make illegal an act which one has a legal right to do, are not controlling upon this point. Thus *Letts v. Kessler*, 54 O. S., 73 (spite fence), can be distinguished upon the ground that, in Ohio, one has no property right in light and air from adjoining property; *Kelley v. Ohio Oil Co.*, 57 O. S., 327 (oil wells), upon the ground that, similarly, there is no property right in percolating water or oil; and in *Lancaster v. Hamburger*, 70 O. S., 156 (procuring the discharge of a conductor by reporting misconduct), there was either an absence of malice or a justification for the defendant's act which in itself was a defense upon the ground of public policy and negatived any actual malice which may have existed. But, whether Section 12477, of the General Code may be held to apply to the instant case or not, we are of the opinion that the criminal law of this state, and every other, is so rife with instances in which acts in themselves lawful enough become unlawful when done as steps toward the accomplishment of an ultimate unlawful purpose that no weight whatever can be given to the argument of the defendants that the ultimate injury to plaintiffs' business can not be enjoined, even though unlawful, because the means used were, in themselves, lawful. See *U. S. v. Debs et al*, 64 Fed., 724, 763:

"The rule is familiar in criminal jurisprudence that any act, however innocent in itself, becomes wrongful or criminal when done in furtherance of an unlawful design."

And *Gompers v. Buck Stove & Range Co.*, 221 U. S., 418:

"The court's protective and restraining powers extend to every device whereby property is irreparably damaged or com-

merce is illegally restrained. To hold that the restraint of trade under the Sherman Anti-Trust Act or on general principles of law could be enjoined, but that the means through which the restraints so accomplished could not be enjoined, would be to render the law impotent."

We are of the opinion that both upon reason and authority a wholly unjustified and malicious attack upon the plaintiffs' business can not be said to be lawful even though interdicted by no express enactment of our criminal code.

"It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction is one of the most valuable of all rights; indeed, in the commercial world, the right of greatest value is the right freely to carry on a lawful business, without unlawful interruption. It is a substantial right which may be protected by any remedy known to the court as fully as a constitutional or statutory right, and as fully as rights in ordinary forms of property." *Ry. Co. v. McConnell*, 82 Fed., 55, 68.

"No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business * * *. All parties to a conspiracy to ruin the business of another because of his refusal to do some act against his will or judgment are liable for all other acts illegally done pursuant to such conspiracy and for the subsequent loss, whether they were active participants or not." *Purington v. Hinchliff*, 76 N. E., 47.

"If the purposes of the undertaking complained of were purely and simply, or even primarily, interferences with the plaintiff in the control of its business as alleged, no act, however innocent in itself, directed to that end can be said to have a lawful purpose for its doing." *Tri-City Central Trades Council v. American Steel Foundries*, 238 Fed., 728.

"But where a labor union calls or threatens to call a strike of its members, not primarily for the lawful benefit or advantage of the union or of its members, but for an unlawful purpose—that is, one prohibited by law or which contravenes public policy, to the injury of another or others, then this action or threatened action if consummated will render it liable for damages, and if not consummated may be enjoined." *Grassi Contracting Co. v. Bennett*, 174 App. Div., 244 (N. Y.).

But, it is contended, this broad principle just stated, if carried to its logical conclusion, would make unlawful every strike because in every strike there exists the intention temporarily to injure the business of the employer and thus to enforce the de-

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mands of the strikers as to pay or working conditions. This contention loses sight of the fact that the court holds such malicious injury as unlawful only when without justification, while in the case of the ordinary strike such strike finds its justification, and consequent exception from the general rule, in the fact that there is a dispute between employer and employee. It is the element of competition between capital and labor as to rate of pay and working conditions and the element of the existence of a trade dispute upon these questions that justifies the strike and we wish to express our complete concurrence in the language of the Court in *Pickett v. Walsh*, 192 *Mass.*, 572, where it is said:

“In our opinion organized labor’s right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute.”

This same idea is exemplified in the language of Judge Carter in the case of *Kemp v. Division No. 241, Amalgamated Society*, 99 N. E., 389 (Ill.):

“By the weight of authority and in accord with sound public policy, a sympathetic strike or boycott must be held unlawful and as not within the immediate field of competition. Persons who have nothing to do with the trade dispute—non-combatants—can not be compelled by such means to take part in the struggle.”

See, also, *Jonas Glass Co. v. Glass Blowers Assn.*, 72 N. J. Eq., 653, 663-4; *Thomas v. Cincinnati, etc., Ry. Co.*, 62 Fed., 803; and *Purvis v. Local No. 500*, 214 Pa., 348.

As to the contention that any individual may abstain from trading with the plaintiffs, whatever his motive and without responsibility for any injury to plaintiffs’ business by reason of such abstinence, and that what one may lawfully do he may lawfully combine with others to accomplish and may request any one else to join him in doing, it is sufficient to say that such contention nullifies the whole law of conspiracy and is not, in the opinion of the court, sustained by either reason or authority. In support of the principle that certain conduct lawful in one individual may become unlawful if done by a combination among several and may be enjoined, see the cases already cited herein and also *Quinn v. Leathem*, 1901 App. Cases (Eng).

945; *Martell v. White*, 185 Mass., 255; *Mogul Steamship Co. v. McGregor*, L. R. 22 Q. B. D., 216; *Arthur v. Oakes*, 63 Fed., 210; *State v. Glidden*, 55 Conn., 75; *Hopkins v. Oxley Stave Co.*, 49 U. S., 259, 260, 261; *Union v. People*, 220 Ill., 355; *Bailey v. Master Plumbers*, 46 L. R. A., 561-6; *Cramp v. Commonwealth*, 84 Va., 929; *Brown v. Jacobs Co.*, 115 Ga., 426; *Erdman v. Mitchell*, 207 Pa. St., 79; and *Hamilton Brown Shoe Co. v. Saxe*, 131 Mo., 19.

Further, and as a second ground for making the injunction perpetual, the court considers the acts of the defendants as constituting an illegal restraint of trade and as such subject to injunction.

Sec. 6391, *et seq.*, of the General Code of Ohio define a trust as a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, for any or all of the following purposes: 1. To create or carry out restrictions in trade or commerce, etc., and make such restraints illegal, and the prohibition of these sections of the General Code extends, as was said of Sec. 1 of the Sherman Act, in *U. S. v. Patten*, 222 U. S., 525, not only to voluntary restraints but to involuntary restraints as well, as where persons not engaged in commerce "conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein." As is said by Chief Justice Erle in his work on Labor Unions, quoted with approval in the case of *Loewe v. Luwlor*, 208 U. S., at 295, "at common law every person has individually, and the public also has collectively, the right to require that the course of trade should be kept free from unreasonable obstruction." The principle underlying all the cases involving the question of conspiracy made effective through the violation of the Sherman Anti-Trust Law is to the effect that the plaintiff injured by reason of such conspiracy or boycott has a right to demand that trade be permitted to flow in its normal course unimpeded and undisturbed by the acts of the defendants and that public policy also demands this. Just as soon as the public is deprived of the benefit of full and free competition or the individual is deprived of the benefit of conducting his business in the manner which seems to him most

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advisable, a restraint arises in normal trade conditions, which, if without justification, can not be said to be lawful.

In *Haverhill-Strand Theatre Co. v. Gillen et al*, L. R. A., 1918-C, 813, the court says:

“A combination which interferes with the plaintiff's right to a free flow of labor is legal if the purpose for which it is made justified the interference with that right. On the other hand, it is illegal if that purpose does not justify the interference.”

And in *Eastern States R. L. D. Assn. v. U. S.*, 234 U. S., 600, 612-13, the court in speaking of the circulation of a “do not patronize” list, says:

“In other words the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of a grievance of one of the association, who had reported a wrong to himself. which grievance, when brought to the attention of others, it was hoped would deter them from dealing with the offending party. This practice (the circulation of black lists) takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in *Loewe v. Lawlor*, 208 U. S., 274.”

In the present case we think the purpose in displaying the banner was the same as the purpose of the defendants in the case just cited, in circulating the so-called black lists; and the effect in diverting trade from its normal channels was the same. The restraint was not as marked but it was a restraint and therefore an interference with the right in the plaintiffs, and the public, to have trade wholly free. Quoting again from *Loewe v. Lawlor*, 208 U. S., 274:

“The act (the Sherman Act) prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between states, or *restricts in that regard the liberty of the trader to engage in business.*

The combination charged falls within the class of restraint of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes. * * *

We are of the opinion that the same principle applies to intra-

state trade under the Ohio anti-trust law as has been so frequently applied to inter-state commerce under the Sherman Act.

Lastly, there is a distinct element of coercion apparent in all the acts and actions of the defendants, not only as directed against the plaintiffs but also as directed against the plaintiffs' customers. It is clearly apparent that not only is the banner sought to be displayed for the purpose of coercing the plaintiffs into doing that which they have a clear legal right to abstain from doing, but also for the purpose of diverting from their business the trade of union customers and their families, not voluntarily, but through some fear of complications with the unions to which such customers might belong if they did not abstain from trading with the plaintiffs. It has been said that "freedom of the will not inconsistent with the rights of others is the very foundation of liberty" and that "in such a case, reason and not coercion is the only remedy that justice prescribes." (*Park v. Hotel & R. Emp. Int. Alliance*, Ohio Law Bulletin, July 14, 1919) and that "the liberty of a man's mind and will, to say how he shall bestow himself, his means, his talents and his industry, is as much a subject of the law's protection as is that of his body" (Lord Brampton in *Quinn v. Leatham*, *supra*.) Nor is it necessary that the fear constituting the intimidation and coercion should be the fear of physical injury. nor need such fear be abject.

"The clear weight of authority undoubtedly is that a man may be intimidated into doing, or refraining from doing, by fear of loss of business, property or reputation, as well as by dread of loss of life, or injury to health or limb; and the extent of this fear need not be abject but only such as to overcome his judgment, or induce him not to do or to do that which otherwise he would have done or left undone." *Judge Taft in Toledo A. A. & N. M. Ry. Co. v. Penna. Co.*, 54 Fed., 760.

And see also *Plant v. Woods*, 176 Mass., 492.

Clearly, where the intimidation is exercised toward the plaintiffs' customers so as to preclude the free exercise of their will power, the combination becomes unlawful and it would also seem to the court that where the coercion and intimidation is exercised toward the plaintiffs alone, without any justification whatever, such exercise of coercion would make the whole combination illegal even though there was no actual loss of business. The use of

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such unjustifiable force would, in a way, taint the whole proceeding and justify the intervention of a court of equity. "The law should afford protection against the efforts of powerful combinations to rob him of that right (to conduct his business as he pleases) and coerce his will by intimidating his customers and destroying his patronage." *Hamilton Brown Shoe Co. v. Saxey*, 131, No. 19.

A case almost identical as to facts with the one now before the court, but considered solely from the viewpoint of a plaintiff's right to injunction against bannering his theatre where the sole dispute was as to the plaintiff's right, as an employer, to operate one of the moving picture machines, is the case of *Roraback v. Motion Picture Mach. Opp. Union, et al*, 140 Minn., 481, 3. A. L. R., 1290, where the right to injunction was sustained upon the principle that every man had a constitutional right to work in his own business. This case is instructive if, in the instant case, we consider the rights of the plaintiffs from the similar viewpoint of their right to *personally* conduct their business on Saturday nights without the services of any regular employees, as the evidence shows was their practice.

For these reasons the court is of the opinion that the injunction heretofore granted should be made perpetual.

Harry Hess, for plaintiffs.

Samuel I. Lipp, for defendants.

EFFECT OF COVENANTS AGAINST INCUMBRANCES.

Common Pleas Court of Montgomery County

EDWARD E. MCKNIGHT V. COLUMBIAN LAND & BUILDING CO.

Decided, November 5, 1920.

Assessments Against Land—May be Recovered from Anyone of Prior Warrantors Whose Covenant against Incumbrances does not Except Such Existing Assessment.

Demurrer does not lie to a petition for recovery of the amount of an assessment outstanding on land purchased by the plaintiff from a grantee of the defendant and which plaintiff was required to and did pay; when defendants deed recited that "the title so conveyed is clear, free and unincumbered."

SNEDIKER, J.

In this case a demurrer has been filed to the petition. The

defendant claiming that plaintiff does not set forth facts sufficient to constitute a cause of action.

The case is brought to recover on account of certain assessments which were upon the property bought by plaintiff of a grantee of the defendants. In this deed to plaintiff's grantor, the defendant recited:

"That the title so conveyed is clear, free and unincumbered."

There was at the time on the property and not excepted by the deed from the scope of this covenant against incumbrances, an assessment for a street improvement amounting in all to \$320.54. This assessment was by the city of Dayton certified for collection to the auditor of Montgomery county, who caused it to be placed on the several lots conveyed by defendant to plaintiff's grantor, and plaintiff was obliged to and did pay and extinguish the lien of this assessment.

The question raised by counsel in presenting the demurrer was as to the effect of a covenant against incumbrances such as is recited in the pleading.

The claim of counsel for defendant is that such covenant does not run with the land and that therefore, no liability arises on account of payment made by plaintiff. The rule applied in many states is found at page 471, of the 4th Vol. of Kent's Commentaries. The author there says:

"The usual personal covenants inserted in the conveyance of the fee, are 1. That the grantor is lawfully seized; 2. That he has good right to convey; 3. That the land is free from incumbrances; 4. That the grantee shall quietly enjoy; 5. That the grantor will warrant and defend the title against all lawful claims. The covenants of seizin, and of a right to convey, and against incumbrances, are personal covenants, not running with the land, or passing to the assignee; for, if not true, there is a breach of them as soon as the deed is executed, and they become choses in action, which are not technically assignable. But the covenant of warranty, and the covenant for quiet enjoyment, are prospective, and an eviction is necessary to constitute a breach of them. They are, therefore, in the nature of real covenants, and they run with the land conveyed and descend to heirs, and vest in assignees."

This view with respect to a covenant against incumbrances is supported by some states.

In the 5th Conn. Reports, page 497, the first clause of the syllabus reads:

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“The covenants of seizin and against incumbrances in a deed of land are personal covenants, not running with the land; if false, they are broken instantaneously on the delivery of the deed, and being so broken, they become choses in action; they cannot, therefore, be assigned.”

The theory that they are not assignable is based upon the construction of the court that they are choses in action. In the body of the opinion, quoting 2 Johns Reports, the court uses the language of Spencer, Judge, in which he says:

“Choses in action are incapable of assignment at the common law; and what distinguishes these covenants, broken the instant they were made, from an ordinary chose in action? The covenants, it is true, are such as run with the land.”

The court also refers to a case in 4th Conn., in which it was held that:

“From its nature it does not run with the land, as none but real covenants do; * * * Hence, as I have said before, having been broken, the covenant has become a chose in action, and therefore can not be assigned.”

This same rule is supported by the 5th, N. J., page 20, and 2nd, Mass., page 439. But our own Supreme Court takes the view that a covenant against incumbrances does run with the land, and we think very reasonably so if the whole question is to be put upon the ground that such covenant can not run with the land because it constitutes a chose in action which is not assignable. In the state of Ohio, choses in action are assignable. In the 49th, O. S., at page 530 (*Van Dyke v. Rule*), we find the first syllabus to be:

“A covenant against incumbrances, contained in a conveyance of real estate, runs with the land. * * *”

In the body of the opinion, Judge Bradbury says:

“The only covenants that the findings show that these deeds contained were those of warranty and against incumbrances. Whatever the rule may be elsewhere, it was settled in this State by the case of *Foots v. Burnett*, 10 Ohio, 317, decided by this court in 1840, that the covenant against incumbrances is a real covenant which runs with the land.”

We must keep in mind that a real covenant which is one annexed to some estate in land and runs with the land, extends not only to heirs and executors, but assignees as well. Every assignee may on account of a breach of a covenant of this char-

acter, maintain an action against all or any of the prior warrantors until he has obtained satisfaction. The language of the covenant leads to this: each covenantor covenants with the covenantee and assigns, and as the lands are transferable, it is reasonable that the covenants annexed to them should be transferable also.

In the 10th, Ohio, referred to by Judge Bradbury, the Supreme Court at pages 332-3, uses this language:

“The same train of reasoning which led the court to this decision will lead to a similar result with respect to the covenant against incumbrances. This covenant, like the covenant of seizin, is made for the benefit of the grantee in respect to the land. It is not understood as a contract, in which the immediate parties are alone interested, but as intended for the security of all subsequent grantees. If the first grantee continues in possession of the land while his title remains undisturbed, and conveys to a subsequent grantee, in whose time an outstanding incumbrance is enforced against the land, justice requires that this subsequent grantee should have the benefit of the covenant against incumbrances to indemnify himself. We hold, therefore, in accordance with the decision in the case of *Backus v. McSoy*, that a covenant against incumbrances is a covenant running with the land until the incumbrances are removed.”

The view here expressed by the Supreme Court is followed by the Circuit Court of Licking county, 16 C. C. Reports, page 461, and by the Common Pleas Court of Hardin county, 5 O. N. P., page 112, and also by the Superior Court of Cincinnati, 2 Disney, page 571.

In this case, Judge Hoadly says:

“The covenant, of freedom from incumbrances in Ohio, is a real covenant running with the land, not broken until eviction.”

Eviction is of two characters. One actual, the other constructive. Constructive eviction exists where there is interference of any character with the beneficial enjoyment of the estate in question, and the grantee may recover in an action for a breach of a covenant against incumbrances where he has paid off the incumbrance to prevent actual eviction, 10 Heisk, 384, 8 Jones Law, 188. The rule is that where an incumbrance has been removed or paid off by the covenantee, he is entitled as damages for the breach of the covenant against incumbrances, to the amount he has paid with interest.

The demurrer is overruled.

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**VALIDITY OF AGREEMENT GIVING SOLE VOTING RIGHTS
TO ONE CLASS OF STOCKHOLDERS.**

Superior Court of Cincinnati.

LAURA A. KRELL V. THE KRELL PIANO COMPANY.*

Decided, March 29, 1920.

*Corporations—Sales of Property and Assets of—Agreements Between
Stockholders Not a Matter of Public Concern—Where Not Against
Public Policy—Voting Rights Subject to Such Agreements.*

1. A sale of corporate property does not constitute a sale of the company's "entire property and assets" within contemplation of Sections 8710-12, where book accounts, notes and leases of an aggregate value of more than \$200,000 are not included.
2. Where the articles of incorporation contain a stipulation that in the event there occurs a default of payment of six or more semi-annual preferred dividends, then the preferred stockholders shall have the sole and exclusive right to vote, such stipulation in law is a valid binding contract between the stockholders and upon such default the common stockholders are excluded from voting.

Theodore Horstman, for plaintiff.

Ernst, Cassatt & Cottle, for defendant.

GUSWEILER, J.

This an action by some of the stockholders of the defendant company to have this court declare void a sale of certain property and assets of defendant company made by the defendant company on or about August 27th, 1917.

The issues are to be found in the second amended petition, the answer thereto and the reply to the answer. Stated briefly the plaintiffs allege two causes of action.

First. That the sale in question was a sale by the corporation of "its entire property and assets" within the meaning of G. C. Section 8710 *et seq.*; that as such it required the approval of a three-fourths vote at a stockholders' meeting, as provided in

*Affirmed by the Court of Appeals.

Section 8712; that at the stockholders' meeting at which the approval was given in this case, the common stockholders were excluded from voting and that the sale was not therefore in accordance with the statute.

Second. The second cause of action alleges that a named individual was the owner of a majority of the preferred stock of the defendant company and that a majority of the board of directors of the company were under his domination and control; that by virtue of his control of the board and his ownership of a majority of the preferred stock, he caused the directors' and the stockholders' meetings to approve a sale of the entire assets of the defendant company to another company, of which he was the principal owner, at a price far below the real value of such assets.

As to the first issue the evidence shows that the sale to the other company did not include the cash, notes, accounts, bills receivable and certain real estate valued at \$300 in Cheboygan county, Michigan. The notes, accounts and bills receivable included amounts due to the company on open account, notes secured and unsecured, and piano leases, under which the defendant company had leased pianos to customers, said pianos to become the property of the customers upon final payment in installments. The latter item amounted to over \$150,000; the total of all the items, not including cash, amounted to over \$200,000.

We conclude that a sale of the property of the defendant company which excluded assets of that character and amount, was not a sale of the "entire property and assets" of the corporation and that Section 8710 *et seq.* of the General Code of Ohio do not apply. The evidence in the instant case does, however, disclose that this sale practically terminated the company's customary operations as a manufacturing concern.

However, if we concede that this sale was a sale of the "entire property and assets" of the corporation, we find that the requirements of Sections 8710 to 8712 inclusive were fully complied with.

The evidence shows that the agreement for the sale was authorized by three-fourths of the directors as required by Section

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8710; it was submitted to a meeting of which due notice had been given to each of the persons in whose names the stock of the corporation stood on its books, and by due notice published in the newspapers, as required by Section 8711.

The agreement of sale was considered and a vote by ballot taken for its adoption or rejection, and the agreement was approved by three-fourths of all the votes cast at the meeting *by stockholders who were entitled to vote.*

The preferred stockholders had the exclusive voting power in the corporation at the time of this transaction.

The articles of incorporation of the defendant company contain the following language:

“Said preferred stock * * * shall not be entitled to any voting power at the annual or other meetings of the stockholders of said corporation unless default shall have been made by it in the payment of six, or more, of said semi-annual preferred dividends, in which event the holders of said preferred stock shall have *sole voting right*, to the *exclusion* of the holders of its common stock.”

It is not denied that at the time of the sale in August, 1917, there had been a default in the payment of more than six semi-annual preferred dividends. The preferred stockholders thereupon became entitled to the “*sole voting rights, to the exclusion of the holders of its common stock.*”

This provision in the articles of incorporation was authorized not only by General Code, Section 8669 (107 O. L. 411), which expressly authorizes “preferences and voting powers or restrictions or qualifications thereof in the certificate of incorporation,” but it was also valid and binding under the laws of Ohio prior to and without such statute.

Any restriction or deprivation of voting power is a matter of *contract between the stockholders*, binding upon them and in which the public has no concern.

In *Miller v. Ratterman*, 47 O. S. 141, the 3rd syllabus is as follows:

“The ownership of stock in an incorporated company, as a general rule, carries with it the right to vote upon the same at

any meeting of the holders of the capital stock. But to this rule there may be exceptions; and it is competent for a railroad company, in issuing certificates of preferred stock, to stipulate therein that the holders shall not have or exercise the right to vote the same, or as owners of the same, at any meeting of the holders of the capital stock of the company."

The court say on page 158:

"In any view, it is fair to treat the proviso as but an arrangement between two classes of stockholders which did not concern the public. It is true that one characteristic of stock generally is that it can be voted upon. But this is not essential. Indeed, instances may arise where it is good policy to prohibit the voting upon stock."

At the time of this decision of the Supreme Court there was no statute authorizing the exclusion of any class of stockholders from their right to vote under any circumstances. On the contrary, the statute provided (R. S. 3245 Smith & Benedict) with reference to the election of directors "each share shall entitle the owner to as many votes as there are directors to be elected," yet the Supreme Court held that in spite of this statute the stockholders might agree among themselves to the exclusion of one class of stockholders from the right to vote.

When the provisions of the articles of incorporation give the preferred stockholders the "sole voting rights to the exclusion of the holders of the common stock," this applies to the voting rights given under G. C. Section 8712 as well as any others. Section 8712 is as follows:

"At such meeting of stockholders, the agreement of the directors shall be considered and a vote by ballot taken for its adoption or rejections. For each share of stock on which all the installments called for by the board of directors are paid, the holder thereof shall be entitled to one vote. The ballots must be cast in person or by proxy, and if three-fourths of all the votes cast at the meeting be for the adoption of the agreement, it shall be valid and binding on such corporation. Upon its adoption the officers of the company shall execute and deliver to the purchaser good and sufficient deeds and transfers of all the property and

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assets of the corporation, upon the terms and conditions in the agreement provided.”

It should be observed that the thing called for by Section 8712 is not the consent of stockholders in writing or otherwise. The thing called for is a meeting of the stockholders at which the agreement shall be *voted* upon. The power exercised by the stockholders under this section is a “voting power” within the meaning of the articles of incorporation. It is immaterial that the statute provides that the holder of “each share of stock on which all installments called for by the board of directors are paid” shall be entitled to one vote. *That is merely a regulation to be applied to those stockholders who have voting rights.* It would supersede the provision of Section 8636, allowing a vote for each share owned and substitute therefor a limited franchise, viz a vote for each share on which all installments were paid.

The voting right conferred by Section 8712 is no more sacred than that conferred by Section 8636, which gives each stockholder the right to vote for directors the “number of shares owned by him,” and no one would question that such a provision as that found in the articles of incorporation of this company effectually deprives the common stockholder, on the contingency named, of the power to vote for directors.

Section 8712 does no more than state in a general way the conduct of a stockholders’ meeting for the consideration of a contract of sale, and states in an equally general way, the voting rights of the stockholders thereat and it does not over-ride any *agreement between the stockholders* evidenced in the articles of incorporation and in the stock certificates authorized by General Code Section 8669, and also by the law of Ohio prior to and without such a statute, excluding either preferred or common stockholders from the right to vote.

If it be said that a stockholder ought to have the right to vote on the sale of the entire corporate property, especially for the securities of another company, the answer is that so ought he to have the right to a vote in the election of directors. His in-

vestment is as likely to be wrecked by bad management as by an improvident sale. He may just as naturally rely upon the other class of stockholders and the directors for a proper sale of the assets of the company as he may rely upon them for the proper management of its affairs.

In either event the right is not so sacred that it can not be contracted away by the provisions in the articles of incorporation and in the stock certificates.

In *State, ex rel Frank, v. Swanger*, 190 Mo. 561, 89 S. W. 872, 2 L. R. A. N. S. 121, the syllabus is as follows:

“Preferred stock of a corporation may be made non voting under a statute giving the incorporators power to issue such stock and fix the preferences, priorities, classification and character thereof, although the constitution and statutes provide that in all corporate elections each shareholder shall have a right to cast as many votes in the aggregate as shall equal the number of shares held by him.”

This was an action in mandamus to compel Secretary of State to issue certificate of incorporation to the X Company. His defense was that the articles provided that voting power vested exclusively in common stock, which he contended is in violation of constitution of Missouri providing that in all elections for directors each shareholder is to have as many votes as he owns shares; also other provisions of constitution as to increase of indebtedness with consent of stockholders, issuance of preferred stock with consent of stockholders and that all shares shall be voted by the person in whose name they stand, etc. Also (defendant contended), the Missouri statute provided that in elections for directors each shareholder is entitled to as many votes as he has shares.

The court cites and quotes Cook, Corp. 5th Ed. Section 622b (7th ed. vol. 2, Section 622b, p. 1843) as follows:

“There is no rule of public policy which forbids a corporation and its stockholders from making any contract they please in regard to restrictions on the voting power.”

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The court also cites and quotes from *In re Barrow etc. Steel Co.*, L. R., 39 Ch. Div. 582 (1888) at page 603, as follows:

“Again it is said to be unfair that the preference shareholders should be affected by the passing of resolutions (to reduce the capital stock) by the votes of ordinary members of the company; the preference shareholders themselves being excluded by *contract* from any power of voting. I think the answer is that it is by *contract* that they are excluded. It is a part of the *bargain with them*. They were content to take their shares subject to the regulations of the company, although they knew that those *regulations* might be altered by the votes of persons whose votes they could not influence—at any rate directly—by taking part in the voting themselves.

The Attorney General of Ohio in an opinion to the Secretary of State under date of March 1, 1919, (Department Reports March 20, 1919, page 703) held that the articles of incorporation of the Dixie Terminal Company, giving to the preferred stockholders the exclusive right to elect the directors of the company on the contingencies set forth in the articles, was valid and binding.

The opinion was not based on the narrow ground that the preferred stockholders were excluded only from the right to elect directors, but on the broad ground that in the absence of a direct prohibition in the statute, the common and preferred stockholders might *agree among themselves*, through the medium of the articles of incorporation and stock certificate, as to the exclusion of either from the voting power.

The Attorney General says (704) :

“It would seem, however, that if we start, as we must do, with the general rule that both classes have equal voting power unless taken away or abridged by some constitutional or statutory provision, and if it is competent, as it had been held time and again by the courts, to give the common stockholders the exclusive voting power, it would be equally valid to confer such exclusive right upon the holders of the preferred stock. The authorities sustaining provisions restricting the voting power of the preferred stockholders are to the effect that such arrange-

ments are generally matters of private concern to the stockholders only and proper subjects of agreement between themselves. By so contracting, the stockholders do not violate any rule of common law, and if either class, common or preferred, voluntarily agrees to such limitations upon their common right, such agreement can not be said to violate any settled rule of public policy."

1 Machen, Corporations, Section 570:

"The right of shareholders to vote is, however, like the right to dividends or to participate equally in a division of capital in liquidation, regarded as a private matter for each shareholder which he may waive if he choose. Consequently, a provision that shareholders of a certain class shall have no right to vote is, if assented to by them, quite valid. Such a provision might theoretically be made as to either the preferred or the deferred shares, but is much more common with respect to the preferred shares so as to compensate the other shareholders for the preference of the preferred shareholders as to dividends. A provision in an incorporation paper, whereby the preferred shareholders shall have no right to vote is, therefore, valid even though a statute provides that every stockholder shall be entitled to one vote for every share held by him."

3 Clark & Marshall, Corporations, p. 1996:

"A stockholder has no right to vote at corporate meetings, whether the stock is common or preferred, if it is so stipulated when the stock is issued, for the stipulation is then a term of his contract. And even after persons have become stockholders, they may surrender or restrict their power to vote by agreement—by consenting to by-laws or otherwise—provided the agreement does not violate and charter or statutory provision, and is not contrary to public policy." etc.

In 7 Ruling Case Law, p. 345, the law is stated as follows:

"A provision in articles of incorporation that the voting power shall be vested exclusively in the common stock and that preferred stockholders shall have no right to vote has been held not to be violative of any rule of the common law or of public policy. * * * Preferred stockholders may also be given the *sole right* to vote, to the *exclusion* of the holders of the common stock."

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2 Clark & Marshall, Corporations, p. 1320:

“In the absence of charter or statutory provisions or valid stipulation to the contrary, holders of preferred stock have the same right as holders of common stock to vote at stockholders’ meetings. And their *contract* may even give them the right to vote to the *exclusion*, for a time, of the holders of common stock, so as to place the management of the corporation entirely in their hands for the time specified.”

1 Thompson, Corporations, Section 859:

“The rule that a right to vote follows the ownership of stock means that in the absence of any common restriction upon all stock, or upon a class of stock, this right prevails. That is, the right of a stockholder to vote can not be arbitrarily abridged and is not subject to unreasonable restriction. But the rule is equally emphatic, if not so general, that restrictions may be placed upon the right to vote; or, as sometimes stated, the right to vote may be separated from the ownership of stock. It must be remembered, in this connection, that stockholders can make *any agreement* respecting their stock, or the *voting* of it, that they may see fit or deem wise, except agreements that are void as against public policy. * * * It is simply a contract relation between the two classes of stockholders, in which the public has no concern.”

4 Thompson, Corporations, Section 3605:

“The whole matter is one of *contract* or of statutory regulation, and it would not be improper, where there is no statutory or charter prohibition, to confer the sole right to vote upon the *preferred* stockholders to the *exclusion* of the holders of the common stock.”

The provision in Section 8712 relating to such meetings as that here under consideration, that “for each share of stock on which all the installments called for by the board of directors are paid, the holders thereof shall be entitled to one vote” is not a prohibition of any agreement between the stockholders to the contrary, namely, an agreement giving the sole voting rights to the preferred stockholders.

As we have seen, the Supreme Court of Ohio held in the case

of *Miller v. Ratterman*, that the preferred stockholders might be deprived of the right to vote, even though the statute at that time expressly provided that in the election of directors "each share shall entitle the owner to as many votes as there are directors to be elected." In other words, Section 8712 simply related to the voting rights of the stockholders in the absence of an agreement to the contrary.

It is contended that Section 8712 was passed after Section 8669, which authorizes the corporation to create restrictions or qualifications of the voting powers, and that therefore it amends or limits Section 8669.

This does not follow because the later statute is not, as a matter of fact, inconsistent with the earlier one, Section 8712, providing for the voting at a meeting where a sale of the entire assets of a corporation is being considered, is like Section 8636, which provides for the election of directors, subject to the provisions of Section 8669 and to the law of Ohio before and without such Section 8669, which authorizes agreements among the stockholders, embodied in the articles of incorporation or otherwise, excluding one or the other class from the right to vote.

If the Legislature had intended to prohibit the exclusion of common or preferred stockholders from the right to vote under Section 8712, it would have said so, as it did recently in Section 8698 (as amended March 30, 1917; 107 O. L. on p. 415).

In the section just referred to, which relates to meetings called for the purpose of increasing the stock, issuing preferred stock, etc., the Legislature uses the following language:

"For the purposes of this section restrictions or limitations on the voting power of any of the authorized capital stock shall not apply."

This section provides for increase of capital stock, in effect it grants a franchise, a right from the state, and therefore the state is directly interested and would naturally prescribe the terms and procedure without reference to the contractual relations of the stockholders. In doing so, the state provided, in

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G. C. 8698, that “for the purposes of this Section, restrictions or limitations on the voting powers of any of the authorized capital stock shall not apply;” in other words, that the amount of stock which must agree to the increase is to include all stock without reference to limitations upon the voting power; otherwise the state will not grant authority to increase the stock.

The Legislature having its attention called to the restrictions and limitations on voting power of stock, provided only in this Act of March 30th, 1917, that they should be disregarded in proceedings under that act. It limited such provision to ‘the purposes of this Section,’ viz., the increase of stock. If it had intended those restrictions to be disregarded in proceedings under Section 8712 it would have said so. *Expressio unius est exclusio alterius*.

In the case of *State v. Gilbert*, 75 O. S. 1, 47, the court said at page 47:

“The familiar maxim of interpretation, *expressio unius est exclusio alterius*, applies here; for logically the express grant of certain powers and silence as to others is necessarily a withholding of those not named.”

In *Richards v. Market Exchange Bank Co.*, 81 O. S. 348, the 2nd syllabus is as follows:

“Section 3175j, Revised Statutes, relating to the discharge of negotiable instruments, provides in what manner, and for what causes, such instruments may be discharged, and, by force of the rule *expressio unius est exclusio alterius*, sureties upon such instruments who are primarily liable thereon can not be otherwise relieved from responsibility for their payment.”

So, in the case at bar, the expression of the Legislature that restrictions on voting power of stock should be disregarded in the matter of the increase of stock, implies that without such expressed provision by the Legislature they would not have been disregarded, and further implies that in all other matters they are not to be disregarded.

If it be suggested that the increase of stock is a matter of less

importance than a sale under Section 8712, the answer is that the Legislature has said with respect to one that the limitations and restrictions on the voting power of different classes of stock shall be ignored, and with respect to the other has made no such declaration. It is not for the courts to add a limitation where none is provided by the Legislature.

It is clear, therefore, that by contract, with or without the statute, the common stockholders were lawfully deprived, on the contingency which had happened in this case, of the power to vote.

While, of course, their interest in the corporate property could not be taken from them, or their rights therein impaired, they could have nothing to do with the management of the company and in any matter upon which they would ordinarily have the right to vote they no longer had that right.

The common and preferred stockholders in the case at bar, at least during the contingency of failure of dividend payments, were bound by the contractual conditions contained in the company's articles of incorporation, in their acceptance of stock in said corporation. The conditions were not illegal or improper and by the terms thereof on the default of the company to pay its semi-annual preferred dividends for six periods the holders of the preferred stock obtained the sole and exclusive right to vote at all stockholders meetings. The whole matter was one of contract, was reasonable and fair and on the happening of the contingency conferred upon the preferred stockholders the sole right to vote to the exclusion of the holders of common stock. In law the common stockholders are presumed to have known of this limitation upon their right to vote when the common stock was accepted, and they may make any agreement respecting their stock or the voting of it, that they may see fit or deem wise, except agreements that are void as against public policy, such is simply a contract relation between the two classes of stockholders, in which the public has no concern.

As to the second issue we find that the action that was taken by the board of directors and by a majority of the stockholders

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of the defendant company who had the right to vote can not be successfully attacked by dissenting stockholders except upon substantial proof of bad faith.

Clark and Marshall on Corporations:

Section 554. Discretionary powers of directors or majority of the stockholders.

(a) In general—The doctrine that a stockholder may sue in equity to redress or prevent wrongs on the part of the directors or majority of the stockholders, or to obtain redress on behalf of the corporation for injuries by strangers, where he can not obtain relief through the corporation, does not give a stockholder the right to maintain such a bill where the act complained of, or the refusal of the directors or majority of the stockholders to sue, is properly within the discretionary power with respect to the internal affairs of the corporation vested in them by the charter. So long as they act, not fraudulently, illegally, or oppressively, but in good faith, in the exercise of their discretion, and for what they deem to be the best interests of the company, a court of equity has no jurisdiction to interfere at the suit of a dissenting stockholder, or a dissenting minority of the stockholders. Such a suit can not be maintained by showing a mere mistake or error of judgment on the part of the directors or majority of the stockholders. Their conduct must be *ultra vires*, illegal, fraudulent, or oppressive.”

A majority stockholder of a corporation does not occupy any confidential or trust relation to the corporation or the other stockholders in the matter.

It is contended that majority stockholders occupy a relation to the other stockholders requiring them to exercise good faith, etc. Of course this proposition is not denied, but we fail to find clear and convincing evidence of bad faith in this case. No presumption of bad faith arises from the fact that a majority stockholder, as such, votes at a stockholders' meeting in favor of a sale to another corporation in which he is interested. We have carefully considered all the evidence of what occurred between the parties at the time of this sale—the financial condition of the defendant company at that time and for a long time prior thereto—and are forced to the conclusion that the directors were

doubtless compelled and constrained to do the very thing they did to prevent bankruptcy results or a forced public sale. If the assets had been sold in bankruptcy or public sale we are sanguine that the stockholders and directors complained of could have purchased them at a much better advantage to themselves than could possibly obtain in the present sale. Under all the circumstances the company's interests by this sale were more advantageously secured than could have been possible in bankruptcy. We are not convinced or satisfied by conclusive proof or by a preponderance of the proof that the directors and officers of the defendant company acted fraudulently and in bad faith in the matter of this sale.

The directors made the sale to the other company presumably in the exercise of their best judgment and it is not open to attack on the ground of inadequacy of price; that was a matter for the directors to determine and is not open to review by a court of equity without a clear showing of fraud or bad faith.

It follows and we find that the prayer of plaintiff must be denied and the cause of action dismissed.

DEFENSE OF INSURANCE COVERING THE DAMAGE SUSTAINED.

Superior Court of Cincinnati.

WALTER J. BERG V. JOHN SOFGE.

Decided, March 31, 1915.

Claim for Damages to Automobile—Defense of Payment of all Loss by Insurance Company—Subrogation.

A wrong doer can not escape liability for damages on the plea that the injured party has been indemnified by a third person, such as an insurer, with whom the wrong doer is not in privity and with whom he has no connection.

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Wolf & Bailey, for plaintiff in error.

Robertson & Buchwalter, for defendant in error.

PUGH, J.

The second defense set up in the reply to the defendant's cross petition has been demurred to as not setting out facts sufficient in law to constitute a defense to the cause of action stated in said cross petition.

The cause of action in question consists of a claim for damages for injuries to an automobile, arising from an alleged tort, and the defense involved in this demurrer in substance is that the defendant was insured against these injuries, and, since the accident, has been paid the entire loss, *i. e.*, the damages claimed in this action.

The insurer—a company, by the way—is not a party to this action, nor does it appear that any steps whatever have been taken to enforce any claim by it against the alleged wrongdoer.

It is argued, and is so pleaded though the allegations is a mere conclusion of law—that the effect of the payment of the entire loss was to subrogate the insurer to the cause of action contained in the cross petition, and therefore, such payment operated as an equitable assignment of the claim to said insurer. Hence, it follows according to this argument, the cross petitioner is not the real party in interest, and under General Code, Section 11241, can not maintain this action.

The fallacy of this contention in the opinion of the court, becomes apparent when it is remembered that subrogation is possibly only in equity. The mere payment of the loss by an insurer does not *ipso facto* work an assignment. It merely gives an equity to be subrogated to the claim thus paid, provided there are no existing equities in favor of the insured which forbid such subrogation. Whether there are or are not such equities can only be determined in an action to which both the insurer and the insured are parties, and where each can set out his equitable status and the court can weight and determine the respective equitable claims. No case has been cited or found where a

wrong-doer has been allowed to escape liability to an injured party upon the plea that the latter has been indemnified for his loss by a third person—such as an insurer with whom the wrong-doer is not in privity and with whom he has no connection.

The argument that the wrong-doer would be compelled to pay damages twice over if the injured party could maintain his action after having been reimbursed by his insurer has no foundation either at law or in equity. The only possible recovery by the insurer against the tort-feasor would be on the ground of subrogation to the claim of the injured person, and any defense good against the latter would necessarily be good against anyone subrogated to the claim. A recovery by and payment of the judgment to the injured party would be concluded against all in privity with him, and would settle once and forever all claims to subrogation.

The demurrer will therefore be sustained.

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Staley v. Cusack Company.

**VALIDITY OF UNRECORDED LEASES WITH PRIVILEGE
OF AN ADDITIONAL TERM.**

Common Pleas Court of Montgomery County.

**STALEY, CRABB & THOMAS V. THOMAS CUSACK CO.
(TWO CASES.)**

Decided, November, 1920.

Pleading—Demurrer Applies to the Petition as it Stands Without Presumption as to Outside Facts—Leases with Covenants to "Renew" and Covenants to "Extend" Distinguished—Actions by Foreign Corporations.

1. Demurrer on the ground of lack of capacity to sue does not lie against a petition filed by a foreign corporation, where there is nothing on the face of the petition to show lack of qualification on the part of the plaintiff to bring an action in this state through failure to make certain filings as required by statute.
2. A lease for one year with a privilege of renewal for an additional three years is not open to the construction that it is a lease for four years, and therefore invalid unless written, acknowledged and recorded.

SNEDIKER, J.

These two cases are before the court on demurrers to the several petitions. The allegations of the petition in Case No. 46452 are to the effect:

"Plaintiff says that on or about January 1, 1919, it entered into a written contract with the defendant whereby it acquired for one year from said date exclusive advertising rights for the west wall of defendant's store located on premises known as 1028 and 1031 West Fifth street, Dayton, Ohio. That as a part of said contract, plaintiff was granted privilege of renewal of the same for an additional period of three successive years on the same terms."

In Case No. 46480, the allegations of the petition are:

"Plaintiffs, Staley, Crabb & Thomas, says that it is a corporation engaged in display advertising by means of out door walls,

bill boards; that its principal place of business is located in Indianapolis, Ind.; that defendant, The Thomas Cusack Co., is also a corporation engaged in the same line of business as a competitor and rival of plaintiff, and has its principal place of business in the city of Chicago, Ill.; that both plaintiff and defendant are engaged in said business in the city of Dayton, Ohio; that plaintiff has rights by virtue of certain written contracts with certain lessors to the use of certain walls in said city of Dayton, and also to the use of certain land in said city for bill board display; that in each and every one of said written contracts there is granted to the plaintiff, privilege of renewal of said lease or contract for three successive years on the same terms; that in each and every one of said contracts which is in writing, it has the privilege of renewal for one year from the respective dates hereinafter set forth, and has therefore in each and every case acquired a contract writing for one year from and after the respective dates of expiration hereinafter set forth."

The grounds of the demurrers filed are in each case:

1. That said plaintiff as shown by the petition has no legal capacity to sue, and if the court should find that this demurrer on that ground is not well taken, then,
2. That the petition does not state facts sufficient to constitute a cause of action.

Upon the argument of these demurrers, counsel for defendants made and endeavored to support two contentions. First, they say that the plaintiff is a foreign corporation and these petitions do not show that it has complied with the law of Ohio with respect to filings required in order to qualify it to bring an action in this state. Neither of these petitions have anything to show with respect to whether or not plaintiff has so complied with the law. They do not on their face allege that it has not so complied, and therefore, do not so show that it is unqualified at this time to bring an action in this state. We understand that a demurrer applies itself to the petition as it stands without any presumption as to facts outside of the petition. The old rule that a pleading must be taken more strongly against the pleader is not now so much observed as formerly, and if it were, it would not serve the purpose of the defendants

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in their demurrers. If these petitions indicated on their face that plaintiffs had not made proper filings, then the demurrers would be well taken, but as they do not so show, the demurrers ought to be and are accordingly overruled in that regard.

The next point suggested by counsel was with respect to the invalidity of the lease set out in Case No. 46452. Defendants claim that a lease to the plaintiff for one year with the privilege of renewal of the same for an additional period of three successive years ought to be construed as a lease for four years, and that so construed it ought to be written, acknowledged and recorded.

Upon examining the authorities bearing upon the contention of counsel for defendant in this behalf, we have found some diversity of opinion of the courts of last resort with reference to the construction of a contract of this character.

The New York cases (principally) support counsel, and there is some comfort to be derived from the decisions of Massachusetts. Upon a careful consideration of the question, we are not prepared to follow these states. Speaking respectfully, we think that the courts last referred to, have overlooked to some extent, the meaning of the English language in rendering their opinions. The whole matter can be determined by a proper definition of the word "renewal."

In the 68 W. Va., the Supreme Court at page 330, had the identical question before it. It was discussed as follows:

"Text writers, we believe, without exception, recognize, as do the decisions, the distinction between leases containing covenants to renew, on the same or different terms, and those containing covenants to continue, extend, or containing such words as 'with the privilege to have,' 'with the privilege of keeping,' 'with the privilege if desired,' or 'at the option of the lessee for a further term.' When the covenant is to renew it is generally regarded that the lease indicates the intention of the parties to execute a new lease, and as requiring of the lessee notice to the lessor at or before the expiration of the lease of his election to renew. Jones on Landlord and Tenants, Sections 337-339; Taylor on Landlord and Tenant, Section 406; Tiffany on Landlord and Tenant, 1514; Underhil on Landlord and tenant, 1362. Jones, Section 338, substantially using the language of the Wisconsin court in *Kellock v. Scribner*, 98 Wis. 104, which opposes the rule of the Missouri and New Hampshire courts, says: 'There

is authority that the words (renew and extend) should be construed in accordance with their ordinary meaning. Obviously, one means to prolong, or to lengthen out, the other, to make over, to re-establish, to rebuild; and those courts and writers that have construed them accordingly certainly have the best of the argument, if the judicial construction is to follow the true definition of the words.' "

In the case of *Harry Gray et al v. Maier & Zobelein Brewery et al*, 2 Cal., App. Reports, page 683. The case was a lease for two years, giving an option to renew at the expiration of the term to the party of the first part, the court held (page 658):

"The remaining point necessary for consideration presented by appellants is that the language in the lease, giving it the effect of extending the option to the second party, was a contract for a renewal and not an extension of the lease. With this contention we agree."

In the case of *Doe Dem Kingston Building Society v. Rainsford*, 10 Upper Canada Queen's Bench Reports, page 236, the same construction was placed upon a covenant to renew at the end of the term.

Upon examination of the case of *Swetland & Sons Co. v. The Broynx Realty Co.*, 17 O. C. C. (N. S.), page 247 (which was affirmed without opinion, 86 O. S., 313), we are of the opinion that the same question was decided in the same way by that court. They had before them a lease which was for three years with an option to the tenant to renew or extend the time for another like period; and upon examination of the case found in 162 Mass., Section 473 they state:

"Nor do we perceive any reason for holding that the demise of the term is invalidated by annexing thereto the additional agreement to lease property for an additional period."

On the whole we are of the opinion that the demurrer to the petition in Case No. 46452, and the demurrer to the petition in Case No. 46480, should be overruled, and an entry may be drawn accordingly.

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Summers v. Heastand.

**DETERMINATION THAT TITLE TO LAND WAS ACQUIRED
BY DEVISE.**

Common Pleas Court of Columbiana County.

GALEN SUMMERS V. MARION HEASTAND ET AL.

Decided, October 7, 1920.

*Title—Acquired by Devise and Not by Purchase—Although the Devisee
was Charged with Payment of a Bequest.*

Title to land devised by the will of the mother to her son, the devise
in the will being the source of devisee's title, is acquired by devise
from an ancestor, and not by purchase, although charged with the
payment of \$700.00 by the devisee to his sister.

*George T. Farrell and C. C. Connell, for plaintiff.**J. R. Carey, for answering defendants.***MOORE, J.**

This action is brought by the plaintiff to obtain partition of
52.10 acres of land in Knox township, this county. The peti-
tion alleges that the plaintiff and certain of the defendants are
the owners of said land and tenants in common as heirs of one
Everett Summers, deceased, and sets out the share of each. It
then alleges that the defendants Annie Paxson, Albert Fox, Otis
Fox, Viola Fox Summers and the unknown heirs of Solomon Fox,
deceased, have no interest in said land, but claim some interest
therein as heirs of Catherine Summers, deceased, which is a
cloud upon the title of the owners thereof, and asking that they
set forth their claims or be forever barred, and they have an-
swered claiming they are the owners of undivided interests in
said land, and that the said land came to Everett Summers by
purchase. The plaintiff claims the land came to said Everett
Summers by devise under the will of Fannie Summers.

The facts are these:

Many years ago Fannie Summers became the owner in fee simple of said land by deed from her husband. Said Everett Summers was a son of said Fannie Summers. The plaintiff is a son of said Fannie. Certain of the defendants are heirs of the other children of said Fannie Summers, deceased.

Catherine Summers was the wife of said Everett Summers, had no children, and she died five days after the death of said Everett, and both died intestate. The said answering defendants are the heirs of said Catherine, and not related to said Everett, except by his marriage to Catherine.

When said Fannie Summers died, she left a will which was duly admitted to probate in the probate court of Stark county, and by item two thereof she provided as follows:

“Item 2. I give and devise to my son Everett E. Summers the south half of the old homestead farm which was deeded to me by my husband George S. Summers in his lifetime situated in Columbiana county, Ohio, and which south half contains 52 acres of land, the dividing line to run through the middle of said farm east to west. My said son is to have said 52 acres upon the condition that he pay to my daughter Mary F. Meese the sum of \$700.”

It is admitted that said Everett did pay said sum of \$700 to said Mary F. Meese.

If Everett E. Summers acquired his title by purchase, then said answering defendants, heirs of Catherine Summers, would be entitled to an interest in said land under Section 8574 of the G. C., but if he acquired his title by devise under said will, then said heirs of Catherine would have no title or interest in said land. See Sec. 8573, G. C.

The case of *Beight v. Organ*, 6 App. R., 281, 27 O. C. A., 22, has been cited to the court as controlling in the instant case, but the court distinguishes that case from the instant case. In the *Beight* case Adam Yarian gave to his daughter Anna Yarian his farm of 100 acres of land, providing she pay to the executor within three years after testator's death the sum of \$4,000. She was to elect whether or not she would take the farm at the price mentioned. The executor was directed to convey the farm to her upon the payment of the \$4,000. If she did not elect

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to take the farm at the price mentioned, the executor was ordered to sell it to others. The \$4,000 and all testator's other property was to be divided share and share alike, and Anna being a daughter, it is fair to presume she was to get her share thereof. Then Judge Farr, in the opinion on page 290, quotes the words of the will as follows: "The money arising from the sale of my farm," and then says, "Adam Yarian regarded it as a sale, for he expressly so stated."

In said Beight case it is not so stated in the opinion of the court, yet from the language of the will, where it states "at the price mentioned," it is fair to infer that the father and daughter had discussed, and probably agreed upon, the price at which she might elect to take said farm of 100 acres. All that was devised to the daughter was a mere option on her part to purchase at said price.

In the instant case the \$700 was to be paid to a daughter of Fannie Summers, and not to the executor. Everett E. Summers was not to elect to take the 52 acres *at the price mentioned*. There is nothing in the Summers will about the devise to Everett being a sale, nor was he to share in the \$700 so to be paid by him to his sister. Everett, under the will of his mother, took the 52 acres by the devise of the same to him charged with paying the \$700 to his sister, and she could enforce the payment of the same by action against the 52 acres making him the defendant. The said 52 acres is a farm worth heretofore and now several thousand dollars, and certainly Fannie Summers did not consider she was selling the 52 acres to Everett, but intended it as a gift to him by the devise in her will with the charge upon it of the \$700 to Mrs. Meese.

There is another case directly in point in Ohio, *Kibler v. Blair*, 20 N. P. (N. S.), 303, in which it is held as follows:

"A devise to a son is not made non-ancestral by a gift of \$5,000 to a daughter made a lien on the devise, for the devise is merely diminished by \$5,000, but its nature is not changed."

The cases 94 O. S., 17 and 16 O. C. C. R., 171, throw some light on the question in the instant case.

On page 181 in the opinion of said case in 16 O. C. C. R., —,

the court say, the statute says, "When a person dies intestate having right or title to any real estate or inheritance in this state, which title came to such intestate by descent, devise or deed of gift from an ancestor, the court is not at liberty to follow into fields of equity or hunt after equitable titles, when there is a legal title the intestate died seized of. That legal title is the only one comprehended by the statute. The source of it to the intestate determines whether the estate is to descend as ancestral or non-ancestral property." The source of title to Everett E. Summers of said 52 acres is the devise of the same to him in the will of his mother, and that title he took directly under and by virtue of the will alone.

In *Beight v. Organ, supra*, the source of the daughter's title was the deed from the executor, for by that will upon payment of the \$4,000, "the price mentioned" in the will by the daughter to the executor, he was to convey the said 100 acres to her, and he did so convey the same.

In 189 Ill., 107, 59 N. E., 606, the sixth paragraph of the syllabus is as follows:

"6. A provision in a will as follows: 'I give and bequeath to my son E. certain land provided he pay to my daughter H. within two years of my death, the sum of \$1,000, and to my daughter M. within three years of my death, the sum of \$1,000—passed title absolutely to the son charged with the payment of the legacies.'"

In *Kinney v. Glasgow et al*, 53 Pa., 141, in the fifth paragraph of the syllabus, it is held that,

"Independently of an express intent, the charge of a legacy on a devise greater than the devisee would take by descent, will not convert a devise into a purchase."

In the opinion of the court on page 145 of said case, it is said:

"There being no testamentary rule by which the land can be apportioned between the gratuity and the encumbrance, there is no reason to conclude that the testator meant to devise any portion of the land in consideration of the payment of the charge upon it. And independently of an express intent,

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there is nothing in the charge itself which should convert the devise into a mere purchase. The subject of it still retains its prime character as a gratuity. Its tint, it is true, is changed by the mixture, but its color remains the same. The payment but diminishes the value of the gratuity, but not its character."

In the instant case this court is of the opinion that Everett E. Summers took said 52 acres under said will of his mother by devise from an ancestor, and not by purchase, and therefore the said answering defendants have no interest, right or title to, or in said 52 acres, or any part thereof, and a decree may be entered accordingly.

COMPENSATION WHERE DEATH IS CAUSED BY HEAT STROKE.

Common Pleas Court of Hamilton County.

KATE WHITE V. WALLACE YAPLE ET AL.

Decided, January Term, 1921.

Workmen's Compensation—Heat Stroke an Injury for Which Compensation May be Claimed—Use of Intoxicating Liquor by the Decedent—Separation from his Family at Intervals Does Not Deprive Them of the Right to Compensation.

1. The fact that one killed during the course of his employment was addicted to the use of intoxicating liquor and such use may have contributed to his death from heat stroke, will not be permitted to militate against the claim of his dependent widow and children, where it appears that the stroke was suffered in the course of his employment and while at work in the hot sun of a July day.
2. Neither does the fact that the decedent had not lived continuously with his family bar recovery by his dependent widow and three small children of the gross amount payable under the statute.

DARBY, J.

This is an appeal from the order of the Industrial Commission of Ohio, disallowing the plaintiff's claim for compensation, by reason of the death of her husband, John White, while in the

employ of a contributor to the state insurance fund.

In the petition it is alleged that White was in the employ of F. M. Quill, a general contractor, as a laborer working in a ditch in Cincinnati, and that while so working he suddenly collapsed and suffered a heat stroke, which caused his death the following day, July 18, 1916; that said stroke occurred in the course of his employment, and that he left his widow, the plaintiff, and three minor children aged seven, ten and twelve years, who were dependent upon him for support.

The answer admits the application, and its disallowance; that the deceased was in the employ of Quill, who was a contractor, and contributor to said insurance fund.

On the trial it was agreed that the children were as named in the petition; that the average weekly wage of the deceased at or about the time of his death, was \$11.00.

The plaintiff claims that the death resulted directly from heat stroke suffered in the course of employment of the deceased; that the deceased was at the time living with his wife and minor children, who were entirely dependent upon him, and that plaintiff is entitled to an award of two-thirds of the average weekly wage, for the full period of six years from and after his death.

It is claimed on behalf of the defendants, that the evidence does not show an injury received in the course of employment which is compensable under the laws of the state; that the death of deceased was not caused by heat prostration, or if it was, that it was brought about directly by the use of intoxicating liquors so as not to be compensable, and that the deceased was not living with his family at the time, but was in fact separated from it.

The testimony tends to show that on July 17, 1916, the deceased went to work about seven o'clock in the morning, digging first in a manhole, and afterwards in the street, for his employer; that he continued at this work until about four o'clock in the afternoon, when he collapsed and fell to the street; a physician was called who administered temporary relief, and ordered his immediate removal to the General Hospital; said physician stated that he suspected when he saw the patient that it was a case of heat stroke. The deceased lived until the following day

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at 10:30 p. m., when he died. The death certificate filed with the board of health of this city, gives the cause of death in these words: "Heat stroke. Oedema of Brain. Heat intoxication. Contributory: Heat Intoxication." The hospital records contain similar statements.

Dr. DeCourcy, who called on the patient of the afternoon of the day he was injured, examined him and gave it as his opinion that death was due to heat stroke and concussion of the brain.

The testimony further shows that the deceased was a man some 6 feet in height, weighing about 180 pounds; was a powerful, muscular man, and had not been under medical treatment for a number of years; that he was addicted to the use of intoxicants more or less, to what extent is uncertain.

One witness, Lena Grim, testified that he was on a spree three days during the week immediately before his death. He was actually away from his employment during three or four days in that week; his wife testified that he was home with her on account of her illness; and a statement signed by the witness, Mrs. Grim, was presented in evidence tending to contradict her statement that he was intoxicated during the week before his death. The language of the statement was—

"that she had never seen him under the influence of liquor during the week previous in which he was overcome by heat, and had no liquor in or around my house."

The deceased in the week before his prostration complained of the heat, and the evidence shows that the temperature on the day before, and the day of his prostration and the day after, was respectively, 93 degrees, 91 degrees, 93 degrees. The testimony in the case was that excessive use of intoxicants might reduce the resistance of the body to the effects of excessive heat. Many cases have been discussed in argument touching upon the question as to whether or not heat prostration is an injury received in the course of employment. This court has heretofore decided that it is.

In the case of *Hart v. Duffy et al*, comprising the Ohio Industrial Commission, the deceased was employed in a factory doing

hard, continuous, monotonous labor, during a very hot month, and in the middle of one afternoon, took sick and on the same night died as a result of heat prostration. Some months before this he had undergone an operation for appendicitis.

Since the Haft decision was rendered, the decision of the Court of Appeals of Franklin county, in *Industrial Commission of Ohio v. Brant*, was called to the attention of the court; that decision fully sustains the position that sun stroke, or heat stroke, is an injury within the workmen's compensation law. The policy of this beneficent law is best set forth in Section 1465-91, which provides:

"Such board shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act."

In *Industrial Commission v. Pora*, 100 O. S., 218, it is said:

"The real spirit of this act is to measurably banish technically and to do away with the nicety of distinction so often observable in the law, and commands a liberal construction in favor of employees."

In *Musselli v. Industrial Commission*, 28 O.C.A., 97, it was held:

"The fact that one killed in the course of his employment had contracted a bigamous marriage does not bar his legal wife living in Italy from receiving benefits under the Ohio workmen's compensation act, where there is no evidence that she had been other than a faithful wife."

In an opinion by the Attorney General dated May 23, 1916, 14 O. L. R., 382, is the following:

"Claims arising under the Ohio workmen's compensation law where the proof is controlled by Section 44 of the Act, Section 1465-91, General Code, should be clear but any doubt of a claimant to participate in said fund should be weighed carefully in favor of the claimant."

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Speculation as to what effect his intoxication may have had upon the death of the deceased is idle. As the court understands the record there is no question but that heat stroke, or heat prostration brought about the death of this man: though it might have been induced or contributed to by other conditions found in the body; but the fact that he was addicted to the use of intoxicating liquor, and that that condition might have contributed to his death, should not militate against the claims of the dependent widow and minor children, where the stroke was suffered while he was actually at work in the hot sun in the course of his daily employment.

The courts of this state wherever the matter has come up, have adopted liberal views in favor of the dependents of an employee, or of the injured party himself; as where one suffered frozen feet, another while in the course of his employment was struck in the eye by hail, or where one carelessly threw a pencil which injured a fellow employee in the eye, these cases were held to be in the course of employment.

There was considerable evidence as to whether the wife and children were living with White at, or recently prior to the time of his death; it was claimed that the plaintiff made contradictory statements concerning this matter of his residence. It seems that his wife was a frail woman; his work was at Madisonville, some eight or ten miles from where his wife lived in Cincinnati; that he was required to be at his place of work at seven o'clock in the morning, and that he boarded at the home of Mrs. Grim in Madisonville. The wife, her daughter, and other persons testified that he made his home with the family, was there every week, sometimes for several days, but that as a matter of convenience he boarded during the week at Madisonville.

There is no testimony to dispute that offered on behalf of plaintiff that she and her three minor children were actually dependent upon her husband for support, and that he gave all or part of his wages at home every week.

The court does not look upon the question as to whether the family were actually living together, or not as of great importance. See 142 N. W. (Wis.), 271. Having found that the

death resulted from injury received in the course of his employment, and there being a widow and three children of the ages stated, the plaintiff should receive for herself, and the benefit of said minors, the gross amount allowable under the statute, to continue from the date of the death until six years after the date of the injury, to be computed at the rate of two-thirds of said weekly wage, per week, during said period.

A judgment may be entered for the plaintiff accordingly.

Bolsinger, Kuhn & Bolsinger, and *Chester E. Shook*, for plaintiff.

Louis H. Capelle, Prosecuting Attorney and *Charles W. Baker*, Assistant Prosecuting Attorney, for defendant.

COVENANTS AVAILABLE UNDER DOCTRINE OF RESPONDENT SUPERIOR.

Common Pleas Court of Cuyahoga County.

GRACE KOUBA V. CITY OF CLEVELAND.*

Decided, January Term, 1920.

*Torts—Covenants not to Sue for Negligence of Contractor for a City—
Available to the City as Well as the Contractor.*

In an action for tort, in which it is sought to hold a municipality for the negligence of a contractor under the rule of respondeat superior, a covenant entered into by the plaintiff with the wrongdoer not to sue him is available to the city.

Englander & Bowden, for plaintiff.

James Cassidy, for defendant.

Motion to arrest evidence from jury.

DUNCAN, J.

The plaintiff brings this action to recover for personal injuries which she claims to have received in alighting from a

*Affirmed by the Court of Appeals.

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street car on St. Clair avenue, due to the negligence of the city in the care of the street.

At the time, the street was undergoing the construction of a new pavement by one Burnett, under a contract which he had with the city, and the condition of the street of which she complains was due to his operations under the contract. He had failed to put up red lights, or barriers, at this place, to protect those who might use the street, as he had contracted with the city to do, and this, she claims, was the proximate cause of the accident. His contract also provided that he would protect the city as against any acts or omissions of negligence upon his part in the performance of his work.

There is a statute which imposes the duty upon the city to keep its streets open, in repair, and free from nuisance. If there was any nuisance in this case, it was created by this contractor. That, however, would not relieve the city. The duty is imposed upon the city, as I have said, to keep the streets open, in repair, and free from nuisance, and the city can not contract that duty away, and thereby absolve itself. The principle of *respondeat superior* applies, just the same.

But, Burnett, being the wrongdoer, the plaintiff had the right of election as between him and the city, as to which she would sue. If she sued Burnett, the result of the case would be final, as far as the city is concerned. Burnett could recover no part of any judgment from the city which she might obtain against him. But if she sued the city, and the city gave Burnett notice to come in and defend, as it has here, the city could recover from him the amount of any judgment it would be compelled to pay on account of his negligence. The amount of the judgment in such case, would be conclusive, as against him. Suing the city, therefore, would be reaching Burnett by a circuitous route.

The authorities in this state are to the effect that where a person creates any nuisance for which the city is required to answer, the wrongdoer is primarily liable, and the city secondarily, as it were. But it develops here that the plaintiff has en-

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tered into a covenant with Burnett, the wrongdoer, not to sue him, for which he paid her \$125.00. If, then, she had sued Burnett, instead of the city, he could successfully defend under this covenant.

The rule is different, where the parties are joint wrongdoers,—joint tortfeasors. The right of action is joint, or several. One or both may be sued. And, if either one is required to pay anything, he can not recover any part of it from the other, although the other is just as much to blame or more so than the one who pays. Where, however, the injured person enters into a covenant with one joint tortfeasor “not to sue” him, the amount paid for it is a satisfaction of the amount of the claim *pro tanto*.

Now, unless this covenant “not to sue” Burnett is available to the city as a defense in this action, and the city can recover from him, notwithstanding this covenant, then the plaintiff would be able to deprive him of the benefit of the covenant, and to accomplish something indirectly, that she could not do directly, viz., compel him to pay the damages found as the result of a lawsuit, from which this contract was supposed to protect him. This can not be. It works injustice, and is against public policy and good morals.

I therefore hold that the city occupies the position of surety as it were, to Burnett, under the contract and the imposed duty to keep its streets open, in repair, and free from nuisance, and that when sued for his negligence, in that behalf, every defense otherwise available to him is available to the city.

Holding these views, I will arrest the evidence from the jury, and enter a judgment for the city, under the undisputed facts.

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**DETERMINATION AS TO THE STANDING OF LIENS SUBSEQUENT
TO THE CANCELLATION OF A MORTGAGE BY MISTAKE.**

Common Pleas Court of Montgomery County.

**THE STATE SAVINGS & LOAN ASSOCIATION V. NATHAN
FACTOR ET AL.**

Decided November, 1920.

Mortgage Cancelled by Mistake—Land Transferred and Judgments Attached—Priority of Such a Mortgage—Distinguished from that of an Unrecorded Mortgage—Cancellation Set Aside and Subsequent Liens Attach Only to the Equity of Redemption

Where a mortgage has been cancelled by mistake, a court of equity may grant relief to the mortgagee and set the cancellation aside, notwithstanding that since the cancellation of the mortgage judgment liens have been attached to the land.

PATTERSON, J.

This is an action to set aside the cancellation of a mortgage on the grounds of mistake. Plaintiff says in its petition that on the first day of September, 1910, it loaned the sum of \$3,500 to Bertha and Louis Bilenkin, and received in return their duly executed note and mortgage. The property described in the mortgage is known as lots No. 8666 and 8667, of the revised plat of the city of Dayton, Ohio. On the 14th, day of May, 1912, the sum of \$1,800 was paid upon the principal of said note, and said mortgage was released as to lot No. 8666.

On the 14th, day of May, 1912, Nathan Factor and Esther Factor, in consideration of the sum of \$1,800, to them paid by the plaintiff, executed and delivered to it, their promissory note for said amount, and, in order to secure the payment of same, executed and delivered to plaintiff, their mortgage conveying lot No. 8666, of the revised plat of the city of Dayton, Ohio, as security for the payment of the same.

On the 5th, day of February, 1914, Bertha and Louis Bilenkin conveyed by warranty deed to Esther Factor, lot No. 8667, and

by the terms of this deed the title is warranted clear, free and unincumbered, although at the time there was an unpaid indebtedness on the mortgage of plaintiff in the sum of \$1,700. On the same date, Nathan Factor and Esther Factor, conveyed by quit claim deed, lot No. 8666, to Bertha Bilenkin, and in this deed no mention is made of plaintiff's mortgage on said real estate securing note of \$1,800 and unpaid.

Plaintiff says that at the time of these conveyances, it was not notified thereof, nor did it learn of the same until within a few months prior to the commencement of this action. Bertha Belinkin continued to pay interest on the loan of \$1,700 on lot No. 8667, when in fact she was the owner of lot No. 8666, and upon which plaintiff held a mortgage for \$1,800, and Nathan Factor continued to pay interest on the loan of \$1,800 on lot No. 8666, when in fact, Esther Factor, his wife, was the owner of lot No. 8667, upon which plaintiff held a mortgage securing a note upon which there was due at the time, \$1,700 as above set out.

On the 11th day of August, 1915, plaintiff was notified that Bertha Belinkin's property had been conveyed to one Lena Straitman, and that said Lena Straitman had assumed and agreed to pay plaintiff's loan, and accordingly the loan then carried on plaintiff's books in the name of Bertha Belinkin, which was a loan of \$1,700 on lot No. 8667, was transferred into the name of Lena Straitman, when in fact, the property conveyed to said Lena Straitman was lot No. 8666, upon which plaintiff held a mortgage securing a note for \$1,800.

On or about the 5th day of November, 1915, Lena Straitman, desiring to pay the note held by plaintiff association, by her agreed to be paid, requested the amount due. Plaintiff gave the amount as \$1,700 and interest which she paid. Plaintiff then cancelled and delivered the note to said Lena Straitman, and on the 5th day of November, 1915, released of record said mortgage on lot No. 8667, when in fact said Lena Straitman was the owner of lot No. 8666, upon which plaintiff then held a mortgage securing a note for \$1,800.

Plaintiff prays that the release of mortgage of Bertha Bilenkin and Louis Bilenkin, which mortgage is recorded in Vol. 323,

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page 87 of the mortgage records of Montgomery county, Ohio,—said release dated November 5th, 1915,—be cancelled, recinded and declared of no effect; that the original note and mortgage be surrendered to plaintiff, that the said mortgage be declared a first and valid lien on the real estate described in said mortgage, and that defendants be required to set up their interest in said property, and for such other and further relief as plaintiff may in equity be entitled to.

Plaintiff names as defendants in its petition, E. J. Miller, the Dayton Savings & Trust Co., and W. R. Craven as executors of the will of Michael R. Chambers, and Hyman Thal, and alleged that they claim some interest or lien on the real estate described in the petition or on part thereof.

In addition to the above named defendants, plaintiff also names as defendants, Esther Factor, Bertha Bilenkin, Louis Bilenkin and Lena Straitman.

Lena Straitman filed her answer and cross-petition in which she sets up the source of her title to lot No. 8666, and asks that the unreleased mortgage thereon be released.

The defendants, W. R. Craven and the Dayton Savings & Trust Co., as the executors of the will of Michael Chambers, deceased, filed their answer and cross-petition in which they allege they have no knowledge as to matters and things set forth in the petition and therefore deny the same and demand proof thereof, but admits the record and release of record of the mortgage as averred in the petition. They allege by consideration of the Court of Common Pleas of Montgomery county, Ohio, on the 23d day of November, 1917, in action No. 42691, of said court, they recovered a judgment against defendants, Esther Factor and Nathan Factor and other parties in the sum of \$729.34, with interest thereon at six per cent. per annum from November 23d, 1917, and also \$13.75, their costs, together with accruing costs amounting to \$8.75, which is wholly unpaid and unsatisfied.

They further allege that on the 6th day of August, 1918, an execution was duly issued on said judgment, and, for want of goods and chattels thereon to levy, was on said day duly levied on the real estate described in the petition, which levy still sub-

sists, and that by reason of said judgment and levy these defendants have a lien on said real estate prior and preferable to any and all other liens or claims thereon, including the lien, if any, of plaintiff herein; that by reason of the premises, plaintiff is not entitled to be restored to any rights claimed in the petition, excepting as subject to the aforesaid lien of these defendants.

Wherefore they pray that the court find that the aforesaid lien of these defendants is the first and best lien on said premises, and that the court adjust the priorities of all liens thereon, and that said real estate be ordered sold and the proceeds distributed among the respective claimants according to their respective priorities, as shall be found and decreed by the court, and for such other and further relief as may be proper.

The defendant, E. J. Miller, filed his answer and cross-petition and alleges that he has no knowledge of the matters and things set forth in plaintiff's petition, and therefore denies same, and demands proof thereof, but admits the record and release of record of the mortgage as averred in the petition.

This defendant further says that on the 13th day of May, 1918, by the consideration of the Court of Common Pleas of Montgomery county, Ohio, in case No. 43199, of said court, this answering defendant recovered a judgment against his codefendants, Esther Factor and Nathan Factor, in the sum of \$617.28, with interest thereon from said date and also \$—— as his costs.

He further says that on the 9th day of August, 1918, an execution was duly issued on said judgment, and for want of goods and chattels whereon to levy, was on said day duly levied on said real estate described in the petition, which levy still subsists; that by reason of said judgment and levy this answering defendant has a lien on said real estate prior and preferable to the lien therein, if any, of plaintiff herein; that by reason of the premises plaintiff is not entitled to be restored to any rights claimed by it in the petition herein, except as subject to the aforesaid lien of this answering defendant.

Wherefore this defendant prays the court to adjust the priorities of all liens on said real estate; that said real estate be ordered sold and the proceeds distributed among the respective claim

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according to their priorities as the same shall be found and decreed by the court, and for such other and further relief as may be proper.

No answer is filed by either Nathan or Esther Factor subsequent to the hearing of this case upon its merits.

An order was issued cancelling the mortgage owned by Lena Straitman on lot No. 8666; the plaintiff filed a reply which is a general denial.

The court is asked to determine the right of the plaintiff to the relief prayed for as against the priorities claimed by defendants Miller and the executors of the will of Michael W. Chambers, deceased.

Upon the hearing of this cause upon its merits, it was conceded that the cancellation of the mortgage which is sought to be set aside by this action was made through a mistake and without knowledge of the facts, and that the subsequent transfers of the lots mentioned in the petition were made without knowledge of the plaintiff, and that it had no knowledge of the same or of its mistake of the cancellation of the wrong mortgage until a few months before the commencement of this action; and it was further undisputed in the evidence that the original mortgagors continued paying interest upon their respective mortgages even after title had changed and up until the time of the discovery of the mistake. There is no charge of negligence in the pleadings against the plaintiff.

The main question to be determined by the court, is, when will equity grant relief in the case of a cancellation of a mortgage through mistake, when judgments liens have attached to the real estate covered by the mortgage subsequent to the cancellation of record. As the court understands the theory of counsel for the cross-petitioners, it is to the effect that the mortgage cancelled of record, stands in the same position as far as the mortgagor is concerned as does an unrecorded mortgage as far as the rights of intervening lienholders are concerned. Counsel refers the court to Section 8542 of the General Code of Ohio, which is as follows:

“All mortgages executed agreeably to the provisions of this

chapter, shall be recorded in the office of the recorder of the county in which the mortgaged premises are situate and take effect from the time they are delivered to the recorder in the proper county for recording." etc.

It is the contention for counsel for plaintiff, that the mortgage in question having been cancelled by mistake and without knowledge of the intervening facts, that equity will set aside the cancellation and restore the mortgage to its former priority.

If the cancellation of the mortgage can be set aside, then the liens of the cross-petitioners would only attach to the mortgagees' equity of redemption.

A judgment lienholder does not stand in the same relation to the owner of the real estate as does the mortgagor. A mortgage is a conveyance of real estate for the payment of a debt, and upon the payment of the debt the conveyance becomes null and void.

The contention of counsel for the cross-petitioners has given us considerable concern. We were at first inclined to their view, that a cancelled mortgage, although made through mistake, stands in the same position as an unrecorded mortgage. The briefs of counsel have been quite helpful to the court, but we have not confined our investigation to the authorities cited by them. We have gone further, and shall hereafter set out more in detail the result of our investigation.

As a result of our investigation, we feel that counsel for the cross-petitioners has over-emphasized the effect of Section 8542. of the General Code of Ohio. It is conceded in this case that the mortgage in question was properly filed and recorded, and we feel that that was all that was required of the mortgagor at that time. In other words, the plaintiff was under no obligation at the time of the several transfers above mentioned to examine the title because it knew that it had the first mortgage upon the lots concerned; nor was plaintiff called upon to examine the title before it did for the reason that no information had come to it that would cause it so to do.

The first authority that changed our view upon this matter is found in Section 971, Vol. I, of Jones on Mortgages, Sixth Edition, which reads as follows:

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“When a new mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity and given its original priority as a lien. This was done in a case where the holder of a first mortgage, in ignorance of the existence of a subsequent one on the premises, released his mortgage and took a new one. There was no evidence of mistake except such as might be inferred from the mortgagee’s ignorance of the existence of the intermediate mortgage, and there was no evidence that he would not have made this arrangement had he known this fact; but it was considered that although the court was not at liberty to infer facts not proved, yet that it was at liberty to draw all the inferences which logically and naturally follow from the facts proved; *that it is not an act of reasonable prudence and caution such as men commonly use in the conduct of business affairs for one having a first mortgage upon property, without consideration or other apparent motive, to release it, and take a new mortgage subject to a prior lien of a considerable amount; and therefore it may be inferred that the mortgagee would not have made the release had he known of the intervening mortgage.*

“A court of equity will not grant relief on the ground of mistake, not only when the mistake is expressly proved, but also when it is implied from the nature of the transaction.”

Section 852 of Pomeroy’s Equity Jurisprudence, Vol 2, 4th Edition, reads as follows:

“MISTAKES OF FACTS:—The general doctrine is firmly settled as one of the elementary principles of the equitable jurisdiction, that a court of equity will grant its affirmative or defensive relief, as may be required by the circumstances, from the consequences of any mistake of fact which is a material element of the transaction, and which is not the result of the mistaken party’s own violation of some legal duty, provided that no adequate remedy can be had at law. It has been said, ‘no person can be presumed to be acquainted with all matters of fact connected with a transaction in which he engages.’ This general doctrine is applied in a great variety of forms and under a great variety of circumstances. It presents but few theoretical difficulties; its practical difficulties arise from its application to particular instances of relief, and this application must be largely controlled by the circumstances of each case.”

While all the facts are not parallel to the facts in the in-

stant case, a very instructive decision will be found in 2nd Ohio N. P., Reports, page 248. In the case of the *Turner Bau-Verein No. 3 v. Bertha Dahlheimer et al*; decision of Judge Sayler of the Common Pleas Court of Hamilton county, Ohio. The first syllabus reads as follows:

“If a mortgagee, in taking a new mortgage to secure the same loan, expresses an intent to retain the lien of the prior mortgage, such intent controls, and the lien will be sustained as against intervening liens; if, in taking the new mortgage, such intent will control, and the lien of the prior mortgage is extinguished; if, in taking the new mortgage, he acts under a mistake of fact, as if he act in ignorance of an interevening lien, and no itent is expressed, it will be presumed that he did not intend to release his prior lien, and equity will sustain such prior lien.”

In *French v. DeBow et al*, 38th Mich., page 708. The syllabi beginning with the second syllabus reads as follows:

“*The mere levy of execution in attachment does not give the creditor any rights analogous to those of a bona fide purchaser.*”

“An execution creditor, on making sale and becoming the purchaser, may acquire new equities; but until then he stands in the rights of his debtor and his levy may be defeated by equities which the debtor can not resist.

“*Equity contemplates a lien discharged by mistake as still in existence.*”

“A mortgagee discharged mortgages on certain lands in consideration of a deed of a portion of them which he understood to be otherwise unincumbered, but on which, in fact, an attachment of which he had no notice had been levied since the mortgages were given, though the land had not been sold on execution. *Held*, that it was within the jurisdiction of equity to set aside the discharge; and that the attachment creditor was not deprived of rights thereby, but the equities were adjusted between the parties.”

In the case of *Southern Kansas Farm, Loan and Trust Co. v. Garrity et al*, 57 Kansas, page 805, the syllabi is as follows:

“A release of a mortgage made and entered of record by mistake, where the debt was not in fact paid and when there was no purpose to release the mortgaged premises from the lien of the mortgage debt, may be set aside in equity, and the mort-

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gage will be enforced as a security for the payment of the mortgage debt.

“A release of mortgage so made is only *prima facie* evidence of its discharge, and the party seeking relief may show that it was made by fraud, accident or mistake.”

In the case of *Bond, Administrator of Henry Bussard, v. Dorsey et al*, 65th, Maryland, page 310 the syllabi is as follows:

“Where the holder of two mortgages was paid the amount due on one of them, which he promised to release upon the record, but in fact released the other, which had not been paid, upon a bill filed by his administrator after his death for a foreclosure of the released mortgage, and claiming that the release was made by mistake, it was *Held*:

“1st. That upon satisfactory proof that a mistake of this nature has occurred, equity will intervene and grant relief.

“2nd. That the evidence being such as to leave no reasonable doubt on the mind of any one who carefully examined it, that the deceased did not intend to release the mortgage which had never been paid, and that the release was the result of a mistake, the plaintiff was entitled to the relief asked for.”

We feel that this case is analogous in its facts to the instant case.

In the case of *Young v. Shaner et al*, 73 Iowa, page 555, the syllabus is as follows:

“J and S owned land in common, and they mortgaged it to plaintiff to secure a loan of \$400. Afterwards W obtained a judgment against J, which was a lien on his interest in the land. After this J conveyed his interest to S, who applied to plaintiff for a loan of \$200 more. The loan was granted, and the first mortgage was cancelled, and a new note and mortgage were made for \$600. Both parties to this transaction were ignorant of the judgment against J, and both believed that the \$600 mortgage was a first lien on the land; and plaintiff would not have cancelled the first mortgage had he known of the judgment. *Held*, that the new mortgage, to the extent of the old one, was properly regarded by the trial court as being but a renewal of the old, and that a decree reviving the lien of the old mortgage, and declaring it superior to the lien of the judgment, was properly entered.”

To the same effect as the foregoing are the following cases:

Hammond et al v. Berger et al, Executors, 61 N. H., page 753; *John Geid, Admr., v. Reynolds et al*, 35 Minn., page 331; *Ferguson v. Glassford et al*, 68 Mich., page 36; *Young v. Morgan*, 89 Ill., 199; *Kern v. Hoteling*, 27 Oregon, page 205; *Hutchinson v. Swartsweller*, 31 N. J., Equity Reports, page 205; *Wooster v. Cavender*, 54 Ark., page 153; *Ayers v. Adams*, 82 Ind., page 109.

While all the facts are not parallel to the facts in the instant case, an interesting discussion will be found in the case of *Straman, Admr., v. Richtine et al*, 58 Ohio State Reports, page 443.

Most of the authorities cited by counsel for the cross petitioners are, where the facts disclose that the mortgage recorded was either defective or the mortgage was not entered for record before the lien attached or judgment was obtained.

There are a number of authorities which this court may cite outside of the state of Ohio, that go so far as to hold that an unrecorded mortgage is good as against the claim of a judgment creditor, and there are other authorities to the effect that where a first mortgage is cancelled by the giving of a new mortgage, and the mortgage of a third party intervenes, that the last mortgage will be held to have the same priority as the first mortgage. But these rules do not seem to have been adopted in Ohio, and so we have not cited any of these authorities, and we only refer to them as indicating the extent to which some courts have gone in granting relief against mistake.

There is no allegation in the cross petitions in this case that the judgment creditors surrendered anything or gave any consideration by reason of the state of the record at the time their liens attached to the real estate in question. In other words, these judgment creditors are in the same position that they would have been in had the mortgage not been cancelled by mistake. They have lost no rights, and if the court held otherwise than it does it would mean a great loss to the plaintiff, and a loss occasioned by such a mistake as was altogether reasonable under the circumstances.

In view of the foregoing authorities and based upon the facts in the case, we are of the opinion that the prayer of the petition should be granted.

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The court observed that the cross petitioners have asked for the sale of the premises. The court will grant leave to the plaintiff to amend its petition if it so desires, and ask to have foreclosure of its mortgage upon the lot in question. If it does so, its lien, according to our holding herein will be the first and best lien upon the premises, and the lien of the executors of Chambers will be the second best lien, and the lien of Miller, the third.

We make this suggestion to the plaintiff for the reason that it would be able any way should the court grant the prayer for the sale of the premises as asked for by the cross petitioners, and we feel it would be more regular to amend its petitions and ask for a foreclosure as herein suggested.

**INDIVIDUAL PROPERTY OWNERS GIVEN INJUNCTIVE RELIEF
AGAINST VIOLATION OF AN ORDINANCE.**

Common Pleas Court of Franklin County.

MARY B. DAVIS ET AL V. HARVEY S. SCHMIDT ET AL.

Decided, February 14, 1921.

Nuisance—Ordinance Governing Location and Operation of Public Garages—Violation of Enjoined by Abutting Property Owner—Ordinances Imposing a Duty with Reference to Individuals Rather Than the Whole Public.

An ordinance making the consent of a prescribed proportion of the abutting property owners within a specified distance a prerequisite to the construction or operation of a public automobile garage is not for the benefit of the public at large but for the protection of individuals whose property is within the prescribed zone, and injunction lies upon petition of an abutting owner within the prohibited area against the erection as well as the operation of such a garage.

Booth, Keating, Pomerene & Boulger, for plaintiffs.

Webber, McCoy & Jones, for defendants.

ROGERS, J.

The case is submitted to the court to determine the form of the final decree. It appears that defendant, Schmidt, is about to erect a public automobile garage on East Town street in the city of Columbus, Ohio, in violation of an ordinance of the city. The ordinance, so far as pertinent, provides:

“That it shall be unlawful for any person * * * to locate, build, erect, construct, maintain or operate any public automobile garage on, or within 187½ feet from the curb line of any street in the city or to construct or maintain a public driveway or thoroughfare from the street over the curb and sidewalk to such garage when three-fourths of the buildings on both sides of the street for a distance of 500 feet in either direction from the proposed location of each wall of such garage are used exclusively for residence purposes, without first securing the written consent of two-thirds of the owners of property abutting on the street for a distance of 500 feet in each direction from the median line of such proposed garage according to the frontage on both sides of the street.”

The main contention is as to whether plaintiffs who are owners of property within the prescribed 500 feet from the median line of the proposed garage are entitled to have defendant, Schmidt, enjoined from locating, building, erecting and constructing the threatened public garage. In the concrete, as I conceive the claim of defendants' counsel, it is this: that the threatened violation confers no civil remedial right upon the plaintiffs to enjoin the construction of the building in question; that, while they may enjoin the use of it for the proposed purpose, on the ground of nuisance, as set forth in their petition, they have no right of injunctive relief as against the erection of the structure itself, because the ordinance is about to be violated and they are about to be injured by such breach of the ordinance. No question is made as to the validity of the ordinance and I have taken for

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granted its legal sufficiency as a prohibitive measure against doing those things therein recited.

The question, then, is whether there is a duty imposed upon the defendant by the ordinance for the protection and benefit of plaintiffs, which, if about to be violated by defendant, plaintiffs may have as against the violator a remedial right of relief by injunction for the breach, provided, of course, that the plaintiffs show irreparable injury. Speaking generally, the violation of an ordinance of a municipality gives no right of private action to anyone even though injury results from such violation. See 28 Cyc. 830, and cases. This general rule, however, has its exceptions and modifications which are as well established as the rule itself. I have found no better statement of the rule with its modifications than the pronouncement of Cooley, J., in *Taylor v. R. R. Co.*, 45 Mich. 74. In this case suit was brought to recover damages against the defendant, an abutting property owner on the street, for injuries resulting to the plaintiff from the defendant's failure to keep its sidewalk free from snow and ice in violation of an ordinance enjoining that duty upon abutting property owners. The second syllabus is as follows:

“Breaches of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages; though when the duty imposed is for the protection or benefit of a particular individual or class, as well as for that of the public, there may be an individual right of action, as well as a public prosecution.”

The same principle is announced in the opinion of Matthews, J., in *Hayes v. R. R. Co.*, 111 U. S. 228, at page 240, where, by reason of defendant's failure to build a fence along its right of way in a municipality, in violation of a city ordinance to that effect, plaintiff thereby was injured. Mr. Justice Matthews speaking of the duty to the plaintiff imposed upon defendant by the ordinance said:

“The duty is due, not to the city as a municipal body, but to the public considered as composed of individual persons; and such

persons specially injured by this breach of the obligation are entitled to individual compensation and to any action for its recovery.”

The case, therefore, resolves itself into this: Is the nature of the duty imposed by this ordinance and the benefits accomplished through its performance a duty to the public in part or exclusively, or is it a duty imposed wholly or in part for the protection and benefit of the individuals whose property is intended to be protected as against the erection and use of the threatened public garage? If the latter, according to the above authorities, plaintiffs, if they will sustain irreparable injury, are entitled to enjoin the erection of the structure, as in violation of the ordinance. From an examination of the ordinance and its purposes I am inclined to the opinion that the ordinance imposed the duty upon the defendant as a duty to and for the benefit of the individuals as members of the public, within the area contemplated to be protected against such prohibited structures, and not as a duty to the whole public of the city. Furthermore, the facts show irreparable injury to the persons within the territory protected by the ordinance if the structure is built. Hence, I am of the opinion that on the case made not only the use of such garage may be enjoined, but also its construction:

While the principle set forth in the last two cases was announced in suits at law, there is no reason why it should not be applied when a case in equity is made. If the ordinance imposes a duty for the protection and benefit of individuals whose property is within the area protected, as distinguished from the municipality or public as a whole, then the individual, when there is a threatened or actual breach of such duty, and thereby special injury is about to or has resulted to the individual, has a right of private redress either in equity or law as the facts warrant. In support of this opinion the following cases are cited: *Bank v. Sarlls*, 129 Ind., 201; *Baumgartner v. Hasty*, 160 Ind., 575; *Griswold v. Brega*, 160 Ill., 490; *Bott v. Pratt*, 33 Minn., 323; *Rohrback v. Cavallini*, 210 Ill., App. 182; *Patter-*

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son v. Johnson, 214 Ill., 480; *Bangs v. Dworak*, 75 Neb., 714; *O'Bryan v. Highland Apartment Co.*, 128 Ky., 282.

It is true that an act will not be restrained by injunction merely because it is illegal as being in violation of an ordinance, but when it is shown that the infliction of injury is to the individual, which injury is cognizable in a court of equity, equitable redress will be afforded the injured party.

I am aware that there are decisions in Ohio, some of which, at least, appear to declare that no civil remedy may accrue to an individual injured in consequence of the violation of an ordinance. These cases in the main, however, may be classed among those where the duty imposed by the respective ordinances was to the municipality as an entity, and not to the individuals composing the municipality. In *VanDyke v. Cincinnati*, 1 Disn., 532; *Chambers v. Life Insurance Co.*, 1 Disn., 327; and *Board of Trustees v. Tipling*, 17 C. C. (N.S.), 117, the respective ordinances created no civil liability in favor of the individuals suing for the breach. These cases arose out of failure to obey municipal ordinances enjoining duties to, and to be performed for, the respective municipalities, and not for the benefit of the respective individual suing. No duty was imposed by the ordinances for the protection or benefit of the particular individuals seeking to enforce remedies for their violation. Not so, however, in respect to the ordinance in question. It was adopted for the protection and benefit of the individuals whose residence property came within the prescribed zone to be protected. I will not attempt to reconcile all the cases decided in Ohio.

An interesting discussion of this subject is found in the notes to 5 L. R. A. (N. S.), beginning at page 186, and especially at page 262 *et seq.*, where many of the cases are reviewed. The author of the annotations refers, among others, to the Minnesota cases, where the principle that no liability accrues to the individual injured by the breach of an ordinance has been repudiated.

The Supreme Court of that state has declared, in substance, that there is no reason why a municipal ordinance passed for the benefit and protection of persons pursuant to a charter, and

not inconsistent with the general laws, should not be held to impose such a legal duty, obligatory upon all coming within the municipal limits, that a civil action for damages might be maintained for a breach thereof, as in cases of like breaches of statutory duty. And I see no reason, if in a proper case, the breach of the ordinance may be the basis for damages, why, in case irreparable damages are threatened, equitable interference by injunction may not be had to prevent the threatened injury to individuals whose private rights are about to be invaded.

In conclusion, I am of the opinion that plaintiff is entitled to enjoin not only the use of the structure, if built, but also the construction itself. Accordingly the decree prepared by plaintiffs is passed for record.

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**APPEAL FROM ALLOWANCE OF A CLAIM WHICH WAS
EQUIVALENT TO A REJECTION.**

Common Pleas Court of Knox County.

GUY R. HOGLE V. THE INDUSTRIAL COMMISSION OF OHIO.

Decided, April, 1921.

*Workmen's Compensation—Right of Appeal from an Award Which is
Equivalent to a Rejection—Closing a Case by the Commission Con-
stitutes a Final Order—Commission Without Authority to Pay
for a Surgical Operation to Relieve Trouble Due to Natural Causes.*

1. An appeal will lie from an order of the Industrial Commission under Section 1465-90 of the General Code, which in form purports to be an award from the state insurance fund for personal injuries, but which in fact amounts to a denial of claimant's right to participate at all in such fund on grounds going to the basis of his claim. *Police v. Industrial Commission*, 23 O. C. C. (N.S.), 433 cited and followed.
2. Where the records of the industrial commission show that the claim was referred to the medical department, and afterward to the legal department of the commission, and each of these departments after reviewing the evidence reported adversely to the allowance of compensation on grounds going to the basis of the claim, and the commission thereafter in considering the claim upon its merits with the evidence and these adverse reports before it makes an order purporting to be an award in which it directs payment of the physicians for making examinations of claimant, but makes no award as compensation to the injured workman, and at the close of such order declares "and this case was closed," such action by the commission is tantamount to a rejection of the claim. In effect it is a denial of claimant's right to participate at all in such fund on grounds going to the basis of claimant's right. Such order is a "final action" within the meaning of Section 1465-90 of the General Code.
3. Where on appeal from such decision, the commission files an answer alleging that by its said order it made an award to claimant relying on such alleged "award" to defeat the appeal, and goes to trial upon such issue, it can not thereafter be heard to deny that it had made a "final order" respecting such claim.
4. Where a loss of vision bears no relation to the injury complained of, but is the result of natural causes, it is unlawful for the Commission to pay for a surgical operation from such insurance fund in an effort to restore the lost vision, and the commission is without authority to compel the injured workman to submit to such an operation.

Ewalt & Blair, attorneys for plaintiff.

John G. Price Attorney General, and *R. P. Zumehly*, attorneys for defendant.

BLAIR, J.

This case was submitted to the court upon the motion of defendant for a judgment notwithstanding the verdict, and upon a motion to set aside the verdict of the jury, and to grant a new trial—the jury having returned a verdict or finding in favor of the plaintiff, assessing the amount due him at twelve dollars per week, for a period of one hundred weeks, in all twelve hundred dollars.

In substance, the plaintiff alleges in his petition that on the 3d day of June, 1919, while engaged in the regular course of his employment as a laborer in the plant of the Mt. Vernon Bridge Company, in this city, he was injured by being struck in the left eye by an iron crowbar with which he was working, and that as a result of such injury the sight of his eye was destroyed; that subsequently he filed his claim for compensation for such injury under the Workman's Compensation Law with the Industrial Commission of Ohio which claim was rejected by said Industrial Commission, the suit being brought in this court by way of appeal from the decision of the Industrial Commission.

To this petition the Industrial Commission files an answer, setting up two separate defenses, the first defense being in the nature of a general denial, in which many allegations of the petition are admitted, while others are denied. In a second defense the Industrial Commission, after making numerous admissions, makes the following allegation: "and thereafter the Industrial Commission, on or about the twenty-ninth day of April, 1920, heard and considered this application, together with the evidence in connection therewith, and found and determined that the said plaintiff sustained an injury, in the course of his employment, at the time and in the manner alleged in the application, and that the employer was at the time of the injury a subscriber to the state insurance fund, that said injury was not purposely self inflicted, and that prior to the time of filing his claim with this defendant the applicant had not commenced a civil action against his employer on ac-

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count of said injury. Defendant further alleges that on said date it made an award to the claimant, and ordered and directed that warrants be issued on the state insurance fund for the purpose of paying the same, and that said payments be made as authorized by this plaintiff. Defendant further alleges that on or about the twenty-ninth day of April, 1920, the said Industrial Commission did issue warrants for the payment of money from the state insurance fund on account of the injuries received by the plaintiff on the third day of June, 1919, and delivered them in accordance with the instructions of plaintiff. Wherefore defendant prays that the petition and appeal filed herein be dismissed," etc.

In other words, in this second defense the Industrial Commission denies the right of plaintiff to appeal to this court, because it claims it did not deny his right to participate in such insurance fund. It alleges that by its order of April 29, 1920, it made an award to plaintiff on account of his said injuries, and that its action in this respect is final, and from which no appeal can be had, under Section 1465-90 of the General Code.

That portion of Section 1465-90, General Code, which relates to the right of appeal, reads as follows:

"The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final. Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund upon any ground going to the basis of the claimant's right, then the claimant within thirty (30) days after the notice of the final action of such board, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury," etc.

It will be seen from a reading of the above section that no appeal will lie from the action of the commission, except in cases where it by its action denies the right of the claimant to participate at all in such fund upon some ground going to the basis of claimant's right.

On the trial of this case to a jury, the trial court held that the order of the commission of April 29, 1920, was tantamount to a rejection of plaintiff's claim—that such an order amounted to a denial of the right of plaintiff to participate at

all in such fund, upon grounds going to the basis of plaintiff's right—and submitted the case to the jury upon the issues raised by the first defense (or the general denial), and this action of the court is the principal error urged in support of these motions.

To get the full import of the order of the commission of April 29, 1920, it is necessary to consider the reports and recommendations of the various "divisions" or departments of the commission, upon which it acted in making this order. Dr. T. R. Fletcher, "Chief of the Medical Division" of the commission, to whom the matter had been referred, filed a report showing that plaintiff had been examined by Dr. Brown, in which he quotes Dr. Brown as saying that the loss of plaintiff's eyesight "is not related to the injury." Then this Chief of the Medical Division adds the following conclusion and recommendation:

"Replying on Dr. Brown's report we do not feel that the claim should be approved from a medical standpoint. Recommendation: Payment of account as rendered by Dr. Brown in the amount of \$10.

"T. R. Fletcher,
"Chief Medical Division."

This report of Dr. Fletcher bears date of April 15, 1920. Twelve days later, on April 27, 1920, Mr. C. J. Wardslow, of the "Legal Division" of the Industrial Commission, to whom the matter had been referred, made a report to the commission in which he reviews the claim of plaintiff, quoting from Dr. Fletcher's report, and making recommendations. I quote the following from Mr. Wardlow's report:

"Dr. Brown's report clearly indicates that the condition of both eyes is due to cataracts of idiopathic or natural origin. * * * Conclusion: The evidence fails to show that the loss of vision is due to the injury described. Recommendation: That Dr. Ferree's bill be ordered paid, and that Dr. Brown's bill for special examination be also paid."

Two days later the commission makes its order of April 29, which it claims was an award to plaintiff on account of his injury. This order is as follows:

"On this day the above claim, together with the proof on

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file was presented to the commission, considered, and a finding of facts was made, as follows: That the applicant's injury was sustained in the course of employment, and at the time and in the manner alleged in the application: That applicant's employer was at the time of injury a subscriber to the State Insurance Fund: That said injury was not purposely self inflicted: That prior to the filing of his claim with the commission applicant had not begun a civil action against his employer on account of said injury: That the compensation and award allowed and ordered disbursed and paid from the State Insurance Fund is in accordance with the facts and nature and extent of the injury, and such as is authorized by law and the rules of the commission: That applicant has authorized payments to be made to the payee above named.

"The claim was therefore allowed as herein shown, and order and authority granted to the auditor for issuing warrants in payment of the same according to the rules of the commission. Awards for medical, nurse and hospital services and medicines and compensation (1) to be paid at once; and compensation (2) to be paid according to the rules of the commission. And this case was closed.

"This upon motion of Mr. ——— seconded by Mr. ——— and voted upon as follows: Mr. Clark, aye; Mr. Elliott, aye; Mr. Duffy, aye.

"Date, April 29, 1920.

"Secretary, Robert L. Hayes."

On the same sheet on which this finding of the commission appears, and above the finding, is a statement signed by H. C. Baker, as director of the claims department of the commission, in which the payment of a ten dollar fee each to Dr. Prout and Dr. Ferree is recommended. In this statement no compensation of any kind is recommended, the spaces opposite the heading "Compensation (1)" and "Compensation (2)" being left entirely blank.

There was no proof of the payment of any of the doctor bills, except the ten dollars to Dr. Brown, and the plaintiff did not in any way assent to or approve such payment; neither did he approve or authorize the payment of any doctor bills or other bills incurred in connection with his claim for compensation.

When this second defense is analyzed, in connection with the proof, it amounts to this, and nothing more: It is contended by the commission that plaintiff has no right of appeal, because in its order of April 29, 1920, it allowed certain physicians'

bills for examining plaintiff. In other words, it claims that inasmuch as these physicians' bills were allowed (although no allowance whatever was made to plaintiff for his injury), plaintiff has not been "denied the right to participate in such insurance fund," and therefore has not the right of appeal. This defense is a denial of the jurisdiction of this court to entertain the appeal.

Evidently the commission, in making this defense, overlooked the decision of the Court of Appeals of Cuyahoga county, in the case of *Police v. Industrial Commission*, reported in the 23 O. C. C. (N. S.), 433, the syllabus of which reads as follows:

"An appeal lies from a decision by the Industrial Commission where the award which has been made for a personal injury of a serious character is so small as to indicate that it was intended as a mere gratuity to one not injured in the course of his employment, and therefore not entitled to anything."

In this last cited case the claim was for a serious injury, and the commission, in addition to the physicians' bills had allowed the claimant \$3.50 for a truss and \$7 as compensation for his injury. Judge Grant, in rendering the opinion, condemns the action of the commission in trying to subvert the law, and thus defeat the right of appeal, and refers to its action as "a purposeful design to beat the law."

If the allowance to Police of a \$3.50 truss and \$7 as compensation was tantamount to a rejection of his claim for an injury producing double hernia, surely as much can be said of the action of the commission in the instant case, where plaintiff was allowed nothing for the loss of his eyesight, and the only doctor bill in fact paid by the commission was to a doctor in the employ of the commission, and who reported adversely to the allowance of plaintiff's claim.

In form the order of April 29 was an allowance, or an award, but in substance it was a complete rejection—a total denial of plaintiff's right "to participate at all in such fund." And I am still of the opinion that I was right in holding the case had been properly appealed to this court.

In an exhaustive brief filed on behalf of the defendant commission in support of these motions, the further claim is now

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made that the order of the commission of April 29, 1920, was not a final disposition of the case: that the commission at that time was not in a position to judge the case, and did not pass upon the merits of plaintiff's claim, but retained jurisdiction for the purpose of making whatever other and further orders might be necessary in the future.

This is evidently an afterthought on the part of the commission. It pleaded an award as a bar to the right of appeal, and when that plea fails it changes front, and offers another reason why plaintiff should be denied his right of appeal, and to have his case tried by a jury. Had such a defense as here suggested been pleaded, there would have been no occasion of empaneling a jury to try this case. If in good faith the commission had retained jurisdiction of the case, and meant to consider further the merits of plaintiff's claim, and to further pass upon it, all that was necessary would have been to bring that information to the attention of the court, and further action by the court would have been delayed.

In its answer the commission alleges that "on the 29th day of April, 1920, it heard and considered plaintiff's application, together with the evidence in connection therewith," and further alleges that "on said date it made an award to plaintiff," and directed warrants to issue therefor on the State Insurance Fund, etc. And by referring to the finding and order of the commission of April 29 (a copy of which appears above), it will be noted that the last sentence in said finding and order reads as follows: "And this case was closed."

What further was there for the commission to hear or consider? Dr. Brown, whom the commission had employed to examine plaintiff had reported that the loss of the eye was "not related to the injury." Dr. Fletcher, chief of the medical division, to whom the case had been referred had reported adversely to the allowance of the claim, and Mr. Wardslow, of the legal division to whom the case was thereafter referred, also reported "the evidence fails to show that the loss of vision is due to the injury described," and the commission surely took that view of the case, for here in court before the jury. it stoutly contended that the loss of plaintiff's eyesight bore no relation whatever to the injury, but that such loss of sight

was due entirely to natural causes. The suggestion in defendant's brief that the commission might be willing to pay for an operation in an effort to restore the eyesight is an intimation that the commission will make a law for the occasion all of its own. If the loss of plaintiff's eyesight was caused by the injury complained of, he is entitled to be compensated in the manner prescribed by law—not in the manner prescribed by the commission, to the exclusion of the law. If the loss of the eye was from natural causes, as the commission so stoutly contends, then it is unlawful for the commission to use any portion of the insurance fund either as an award or in experimental surgery. The use of this insurance fund in an experimental operation to restore vision, the loss of which "is not related to the injury," would be a gross misappropriation of such funds, and any effort of the commission to compel this unfortunate workman to submit to such an operation is an assumption of autocratic power not to be tolerated. If the loss of vision "is not related to the injury," then no expert (whether in the employ of the commission or not) should receive payment from this insurance fund for operating upon this subject.

The claim which the commission now makes that its order of April 29, 1920, was not a "final order" (final disposition of the case), I do not think tenable, from any point of view. From a legal standpoint surely it is a final order. It recites a trial or hearing upon the merits of the claim, in which all of the evidence, as well as the reports of the various divisions or departments of the commission to whom the matter had been referred were before it; and after making certain orders pertaining thereto, which the commission claims was an award, it declares, "And this case was closed." If the commission meant to retain the case for further consideration, or for further orders, why was it not "continued," "passed," "adjourned," "postponed," or some term of some kind used to so indicate? Instead, it expressly declares the matter at an end.

Did the commission itself, at the time this appeal was taken, and at the time it filed its answer in this court, consider that the claim was still pending before it? There can be but one answer to this question and that is in the negative. To defeat plaintiff's right of appeal it relied entirely upon an "award"

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which it pleaded as a bar to such appeal—an award in form, but in substance a denial *in toto* of plaintiff's right to participate at all in the insurance fund over which it presides.

For what purpose can it be said this claim is still pending before the commission? Does it wish to hear more evidence as to the cause of plaintiff's blindness?—or is it willing to consider further whether such blindness is in any way “related to the injury?” It makes no such suggestion or intimation. On the contrary, its every suggestion indicates that it considers these questions settled—settled against plaintiff; but it suggests a substitute, a possibility of an offer on the part of the commission to pay for an experimental surgical operation—ostensibly to a surgeon of its own selection. There is no authority of law for this position of the commission.

As all arguments in behalf of the commission have been confined to the question of the right of appeal, we will notice but two of the other assigned errors.

I find no evidence to support the charge of “misconduct” on the part of any juror who served on this panel. Neither do I find “the verdict against the manifest weight of the evidence” The evidence was conclusive that plaintiff had suffered a total loss of vision of his left eye, and of the five doctors who testified, four gave it as their opinion that the loss of vision was due to the injury complained of—the blow from the iron bar, while engaged in the course of his employment as a laborer in the plant of the Mt. Vernon Bridge Company, on June 3, 1919. It is therefore apparent that this ground of the motion is not well taken.

An entry may be placed upon the journal of this court in accordance with the above finding, overruling these motions, and approving the award of the jury and rendering judgment thereon for \$12 per week for a period of one hundred weeks, in all \$1,200, to be paid in the same manner as though such award had been made by the Industrial Commission. All costs in this case, including a reasonable attorney fee to plaintiff's attorneys, will be assessed against the commission. The amount of this attorney fee will be fixed by this court at the time of filing the entry of this judgment, and counsel for the commission are requested to be present in court at that time.

CONTESTED ELECTION FOR LONG TERM AS COUNTY COMMISSIONER.

Common Pleas Court of Allen County.

WALTER W. CRAIG v. A. J. GRAY AND J. W. THOMPSON.
COMMISSIONER.

Decided, February, 1921.

County Commissioners—Election of in 1920—Candidate Receiving Lowest Vote—May Contest Election of the Other Two—For the Purpose of Determining Who shall be Given the Long term.

1. The candidate for county commissioner who received the lowest vote of the three who were elected in 1920, may contest the election of the other two for the purpose of showing that the vote which he received entitles him to a term of four instead of two years.
2. In such a case in the absence of a demand by all parties for a recount of all the precincts in the county, a recount will be ordered in those precincts only in which irregularities have been shown to have occurred in the official count as certified.

T. R. Hamilton, for contestant.

Eugene T. Lippencott and *John L. Cable*, for contestees.

BAILEY, J.

At the November election of 1920 contestant and contestees were the candidates of the Republican party for long terms as county commissioners of Allen county. The vote of each candidate was certified to the board of deputy state supervisors of election of Allen county by the precinct officials and as summarized and declared by said board, was as follows:

J. W. Thompson received	13,416 votes
A. J. Gray received	13,413 votes
Walter W. Craig received	13,410 votes

It will be observed that there is a margin of only six votes from the highest vote to the lowest vote received by these candidates.

Thereupon on December 1, 1920, Walter W. Craig as a contestant took an appeal jointly against the other two Republican candidates from the decision of the board of deputy state supervisors of elections in tabulating and declaring the vote as above stated, and on the 2d day of December two separate appeals were filed in this court, each against one of the contestees above named.

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Thereupon and thereafter in accordance with notice served as provided by statute two justices of the peace of this county, to-wit, E. M. Botkin and E. L. Durbin commenced and took the testimony of several of the election officials who acted in seven precincts in the city of Lima at said election, as to the methods such precinct officials adopted and followed in counting the votes for county commissioners, and this testimony was embodied in a transcript containing about 237 pages and this transcript was submitted to the court. By a motion filed in the common pleas court some time prior to the 26th day of January, this year, these three separate appeals were properly consolidated by this court, so that the matter could be heard and disposed of as one case.

On the 26th day of January, 1921, the case came on for hearing in this court, at which time the contestant submitted the transcript of the evidence taken before the justices of the peace and offered certain exhibits in evidence, and rested his case.

Thereupon the contestees offered the oral testimony of several witnesses as to claimed irregularities that occurred in seven precincts outside of the city of Lima, which indicate that the ballots for county commissioners in the several precincts were improperly and illegally counted and returned to the board of deputy state supervisors of elections.

At the last session of the Legislature an act was passed by that body (Ohio Laws, Vol. 108, Part 2, page 1300) by which it was provided that the two persons receiving the highest number of votes for county commissioner at the November election of 1920 would hold their respective offices for a term of four years or until January 1, 1925, and that the person receiving the lowest number of votes for such office, should hold his office until January 1, 1923. On the ground that the contestant has been deprived of a tenure of office for a period of two years, he instituted this contest and hopes thereby to have the court certify him as having received the highest number of votes, or the next highest number of votes, which will make him eligible to a four year term as county commissioner instead of the two year term now accredited to him.

At the inception of the case the contestees raise the jurisdictional, if not the constitutional question that this is not one

of the questions that can be determined by a contest of election, and that the only person who is authorized to institute a contest of election is a party who has been defeated at the poles for the office he seeks. After a careful examination of the statutes upon that question, I am inclined to the belief, and therefore hold, that the contestant has a right to maintain this action on the ground that, if he shows a sufficient number of mistakes to bring him to the point of being the highest, or next to the highest man in the count of the votes, he will be benefited to the extent of two years of service as county commissioner of this county, and the necessary emoluments innuring to him by reason of such service, and especially is this true when we refer to the old equity maxim, "That where there is a wrong there is a remedy." And the only remedy that the court sees available to the contestant, if his contention as to the mistake in counting the ballots is true, is the proceeding he has here instituted, and the court is firmly of the opinion that his action is clearly within the spirit of the statutes of Ohio providing for the contest of elections, if not within the letter thereof.

The court has had no trouble in finding from the evidence that there were irregularities, mistakes and illegality innocently occurring and practiced in counting the votes of the seven precincts in Lima complained of by the contestant, but as to the number of votes involved in that transaction and covered by the mistakes in the count, the court does not now attempt to decide or even estimate.

The court has likewise had no trouble in finding from the evidence that there was a miscount of the votes for county commissioners in the seven precincts outside of Lima concerning which the contestants have offered evidence, so that the question of the mistakes made in counting the votes for county commissioner, long term, in the fourteen precincts brought into the case by all the parties, is perfectly apparent to the court, and the necessary *prima facie* case for a recount of the ballots of said fourteen precincts has been made out, and the court is satisfied from the evidence that a recount of the ballots cast in these fourteen precincts may change the result of the election in respect as to who are the two persons receiving the highest number of votes for that office and thus be entitled to

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hold the two four-year terms; and this brings us to the only remaining question involved in the case as to whether or not under the evidence as submitted and received the court would be authorized in ordering a recount of all the ballots for the 103 precincts of the county to endeavor to determine the exact vote cast for these three candidates, and the question of whether or not it was properly counted, declared and certified.

This is a legal question, and we will take a hasty glance at the law before determining this matter.

In the case of *Tarr v. Priest*, decided on December 7, 1915, by the Supreme Court of this state and reported in Volume 93 of the Ohio State Reports, at page 199, and at page 202 of the decision the court says:

“We do not think it was the intention of the Legislature in the enactment of the provision of Section 5090-1 which we have quoted, that the ballots should be used as original evidence for the purpose of discovering errors.” And further, “If, upon the trial before the court, there has been evidence tending to show that errors had been committed in any precinct the court was with authority to order a recount of the ballots in that precinct and have such errors as might be found corrected. In the absence of such evidence the court was without authority to act.”

In the Cleveland decision, the case of *Dietrick v. Andrews et al*, reported in the Seventh Court of Appeals report at page 363, on page 371, 28 O. C. A., 209, the court says:

“But if the assumption of the plaintiff in error be correct, that errors of the kind testified to appear in the remaining 500 precincts, in the absence of testimony to the contrary, and in the absence of any fraud, we think that the court would be justified in assuming that similar errors upon the opposing ticket, in the ballot and the counting, would likewise appear throughout the remaining 500 precincts. We think this contention of the contestors is carrying the doctrine of presumptions to an unwarranted length, and would be extending the decision in *Tarr v. Priest* beyond any limits indicated by the language of that decision.”

In the case at bar there is absolutely no evidence as to how the count proceeded in any precinct except the fourteen in question, and under the case just cited the mistakes proved in the fourteen precincts are all similar, that is when a Republican

scratched his ticket for commissioner and voted for one Democrat without any other mark, except the mark under the emblem on the ballot, such ballot was counted for the Democrat for whom he voted, and for the two Republicans who were not opposite the Democrat thus voted for. That seemed to have been the usual method adopted in the fourteen precincts, in counting the votes for the long term of county commissioner, and under this Cleveland decision the court has a right to assume that the Democratic ballots were counted in the same method, and in view of the fact that the votes received by the democrat candidates were more than 2,000 less than the votes received by the Republican candidates, in the absence of a request from all the parties, the court does not deem it necessary or expedient to order a recount of any other than the fourteen precincts hereinbefore mentioned, as it is highly improbable that a recount of all the precincts of the county would change the result of the election for county commissioner. That is to say, that after such recount the Republican candidates would still maintain decisive pluralities over their Democratic opponents.

And the court coming now to pass on the admissability of the testimony and the exhibits offered in evidence admits all the exhibits which have been tendered as to the fourteen precincts hereinafter specifically named, together with all testimony that was taken subject to objection, and the opposite party is awarded an exception to the admissability of each exhibit.

The court is not concerned in this controversy beyond the public question involved which guarantees the right of every citizen to cast his ballot and have the same properly and legally counted and recorded.

The parties have chosen their ground and the weapons with which they will fight, and as hereinbefore stated, unless all parties join in a request to recount the entire county, the recount will proceed as to the fourteen precincts hereinafter enumerated and named.

The attorneys may journalize an interlocutory order in accordance with this opinion as to a recount of the ballots cast at the November election of 1920 for county commissioner of Allen county.

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AS TO STOPPING, LOOKING AND LISTENING.

Common Pleas Court of Hamilton County.

CHARLES ESCHENBACH, JR. v. WALKER D. HINES, AGENT, ETC.

Decided, May 11, 1921.

Railway Crossings—Negligence in Approaching Where the View is Obstructed—View of the Tracks Should be Obtained Before Going Over.

One about to pass over a railway crossing is not cleared of the charge of negligence by the mere fact that he stopped his vehicle at a point where his view of the tracks was obstructed. The stop must be made at a point effective for looking upon down the tracks and ascertaining whether a train is approaching.

Roettinger, J.

At the conclusion of the plaintiff's evidence the defendant moved the court to arrest the case from the jury and to instruct the jury to return a verdict for the defendant, which motion the court granted, and it is on this alleged error of the court that plaintiff has based his motion for a new trial.

The evidence of the plaintiff, in brief, shows the following state of facts:

On December 13, 1919, the date of the accident, plaintiff was in the employ of The George H. Strietmann's Sons Company, as a chauffeur, and was driving one of their Rambler delivery trucks (with the operation of which he was familiar) northwardly along Simpson avenue in Madisonville, Cincinnati, Ohio, and attempted to cross the tracks of the B. & O. S. W. R. R. at the Simpson avenue crossing. At this point the tracks run approximately east and west, the trains going toward the city running in a generally westerly direction.

The plaintiff testified that he had been crossing the railroad at this crossing at least twice a week for about a year so that, of course, he is charged with knowledge of the locality.

There were four tracks in all that had to be crossed. First in order, a spur track leading down to the yards of The Seattle Lumber Company on the east or to the right of Simpson avenue as one approached from the south; next, the east bound main track; next, the west bound main track; and next, a coal siding. The train which struck the truck which the plaintiff was driving was proceeding toward the city on the west bound main or third track. The evidence shows that from the south rail of

the spur or first track to the south rail of the west bound main or third track, the distance was 29 ft. 11 in. The evidence also shows that plaintiff stopped his truck before attempting to cross the tracks, and the point at which he stopped the truck was 25 or 26 feet south of the south rail of the spur, or a distance of 54 feet, 11 in. south of the south rail of the west bound main, the track on which the train was running.

At this point the plaintiff stopped his truck and looked and listened, but his view was cut off both to the east and west by box cars standing on the spur. He testified that to his right or toward the east there was a cut of box cars standing on the spur, at least 20 feet (and possibly more) from the crossing. He stated that these cars interfered with his vision and prevented a clear view of the main track toward the east.

Not seeing anything approaching, he proceeded to cross the tracks without stopping again, and devoting most if not all of his attention to the operation of his truck, and looking straight ahead, or to the north.

The record shows that after the plaintiff was on the spur track, the cut of cars would no longer interfere with his view, and that one could see up the tracks toward the east, for a distance of at least a half mile. Further, the plaintiff testified that his brakes were in good order and that, traveling at the rate of speed at which he ordinarily traveled, he could stop his truck within ten feet.

We hold that one about to cross a railroad track, must stop his vehicle at a point which is an effective point for the purpose of looking up and down the track, and the mere act of stopping once, particularly at a point where one's view is obstructed, is not enough to clear a plaintiff of the charge of negligence. The very fact that the box cars cut off the plaintiff's view should have put him on his guard, and caused him to use greater caution. 15 C.C.(N.S.), 124; 187 Pac. 586; 108 Atl. 175; 56 S. E. 155; 103 S. W., 115.

We are of the opinion that the negligence of the plaintiff was such as to require the court to arrest the case from the jury and instruct the jury to return a verdict in favor of the defendant.

An entry may be prepared in accordance with the terms of the opinion.

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**CANAL LEASES TERMINATED BY ABANDONMENT OF THE
CANAL.**

Common Pleas Court of Hamilton County.

JOHN C. ROGERS, A TAXPAYER, v. CITY OF CINCINNATI, F. W. EDWARDS ET AL, THE BOARD OF RAPID TRANSIT COMMISSIONERS, GEORGE P. CARREL, AUDITOR, AND ALEXANDER PATTERSON, TREASURER, ALL OF SAID CITY.

Decided January 14, 1921.

Canal Water Rights—Leases for Surplus Water were Mere Licenses—Abandonment of a Portion of Canal Terminated Water Rights—Leasees not Entitled to Compensation Because of Failure of Water Leases not Entitled to Compensation Because of Failure of Water Privilege.

1. By the act of March 23d, 1863 (60 Ohio L., 44), and the lease to the city of Cincinnati, executed in accordance therewith, the state abandoned the Miami and Erie Canal, from the east side of Broadway to the Ohio river, for transportation purposes.
2. The right reserved in said act and lease to flow the water through a sewer or conduit, in said part of the canal so abandoned, from the remaining part of said canal above Broadway, was for the benefit of the said remaining part of the canal, and incidentally such flow of water below Broadway, through the sewer or conduit so provided, could be and was used by the state for the benefit of the lessee users of water located in that part of the canal so abandoned for transportation purposes, such as the defendant lessee users herein; but this right so reserved by the state was not a vested right reserved to said lessee users of water; and such rights could be taken away by the state at any time without liability. (*Hubbard v. Toledo*, 21 O. S., 379; *Elevator Co. v. Cincinnati*, 30 O. S., 629 and *Fox v. Cincinnati*, 33 O. S., 492 followed).
3. The acts of May 15, 1911 (102 Ohio Laws, 168), the amendments of April 18th 1913 (103 Ohio Laws 720) and August 15, 1915 (106 Ohio Laws, 293), and the amended lease of January 6, 1917, executed in accordance therewith, providing, as they do, for the abandonment of said canal from the east side of Broadway to a point three hundred (300) feet north of Mitchell avenue, for transportation purposes, by cutting off, or deflecting the water in the canal, into Millcreek, at or near Mitchell avenue, with no provision therein for the flow of water below Broadway, the state thereby exercised its reserved right to terminate the flow of water,

in sewer, conduit or otherwise, in that portion of the abandoned canal, below Broadway, and when the water was deflected from said canal, on October 22, 1919, into Millcreek, at or near Ludlow avenue, no liability was thereby created against the state or city of Cincinnati.

4. The provision, in said last named acts and amended lease, as to the construction of appropriate water works for the benefit of those lessee users of water, located between Broadway and 300 feet north of Mitchell avenue, was expressly limited to them, and as to all such, it is conceded, that the leases or licenses had terminated, been revoked or abandoned, prior to October 22d, 1919, when the water of the canal was deflected into Millcreek, at or near Ludlow avenue, and there was no necessity for the construction of conduits for the benefit of such leases or licenses which no longer existed; and even if this were not true, the users of water below Broadway could not, under said last named acts and amended lease, claim any benefit therefrom, as they are not referred to in any manner therein, as such benefits were expressly reserved to those owning water rights above Broadway.
5. And hence, any and all attempts of the city of Cincinnati, through its board of rapid transit commissioners, or otherwise, to pay the defendants, who claim to own water power leases from the state, located below Broadway, for their so-called water powers, or damages therefor, by reason of cutting off the water of the canal, at or near Mitchell avenue, as authorized in said acts of 1912, 1913 and 1915, and amended lease of 1917, are illegal and void, and the expenditure of money therefor, by the said city, through the said board, or any of its officers, defendants herein, would be and is a misapplication of the funds of the city, and will be enjoined under Section 4311 of the Code, at the suit of a taxpayer, as alleged in the amended petition.

John C. Rogers and Powel Crosley for plaintiff.

Fredk. S. Spiegel, for Board of Rapid Transit Commissioners.

Saul Zielonka and Wm. J. Kuertz, for the City.

Jos. W. Heintzman, for Kilgour Estate.

Waite, Schindel & Bayless, for Carrie M. Fagin.

Frost & Jacobs for Atkins & Pearce Mfg. Co.

FREDERICK L. HOFFMAN, J.

The plaintiff, a taxpayer of the city of Cincinnati, filed a petition against the defendants, praying for an injunction against the said city and the board of rapid transit commissioners, to prevent them from paying out of the treasury the

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sum of \$60,483 in accordance with a certain resolution of the said rapid transit commissioners, to compensate the Atkins and Pearce Manufacturing Company, Carrie M. Fagin, and the Kilgour estate, for certain water rights which they had in the surplus water which flowed from the Miami and Erie canal east of Broadway. These rights were secured under a lease of the state of Ohio to one Clark Williams, said lease being executed on March 26, 1863, and being for ninety-nine years, renewable forever, in all surplus water not needed for transportation purposes of the Miami and Erie canal, which originally ran from north of Mitchell avenue to Broadway, and then passed the property of these defendants east of Broadway to the Ohio river.

The part of the canal east of Broadway, under an act of the legislature passed March 24, 1863, 60 Ohio Laws, 44, was leased by the state of Ohio to the city of Cincinnati. Said city was granted the privilege of occupying said canal east of Broadway forever, with the privilege of using it for highway and sewerage purposes, subject to all outstanding rights, if any, with which said grant might conflict, and upon the condition that the said city was not to obstruct the flow of water through said canal to the west and north thereof, nor destroy, nor injure the then present supply of said water for milling purposes, and that the city should be liable for any damages caused by any obstruction or injury by it.

Under the authority of this lease the city constructed Eggleston avenue on the canal property from the east side of Broadway, and the surplus water from the canal west of the east side of Broadway continued to flow through a culvert to the Ohio river until October 22, 1919, when the board of rapid transit commissioners of the city of Cincinnati, acting under a lease dated January 6, 1917, shut off and deflected the water of the canal into Mill creek, thereby preventing all lessees of water rights east of Broadway from obtaining any surplus water flowing from the canal.

The second lease, executed January 6, 1917, was made under and by virtue of acts passed by the Ohio Legislature May 15, 1911, 102 Ohio Laws, 168; 103 Ohio Laws, 720; and the amend-

ment thereto, passed August 17, 1915, 106 Ohio Laws, 293. Under the latter lease the city of Cincinnati was given the right to enter upon, improve and occupy forever as a public street or boulevard and for sewerage, conduit or subway purposes, all that part of the canal from 300 feet north of Mitchell avenue to the east side of Broadway, on condition that said use and occupancy should be subject to all outstanding rights or claims, if any existed, or with which said lease might conflict, and the city was obligated to construct an outlet from the canal to Mill creek, so as not to obstruct the flow of water north of Mitchell avenue, nor to destroy or injure the then present supply of water for mechanical or commercial purposes, and if necessary, to construct such appropriate works for the supplying of water to lessee users of water along that portion of the canal to be abandoned, so as to enable the state to carry out its obligations to such lessees of water on the part of said canal to be abandoned.

To this petition the defendants filed a demurrer on the ground that the facts alleged did not state a good cause of action.

Plaintiff claims that by the acts of 1911, 1913, and 1915 of the Legislature, authorizing the state to lease the part of the canal west of the east side of Broadway to 300 feet north of Mitchell avenue, and the lease executed thereunder, there was not only an abandonment of the canal between said points, but that whatever rights the Atkins & Pearce Manufacturing Company, Carrie M. Fagin or the Kilgour estate had in the surplus water rights were cut off without subjecting the state or city to liability, and therefore the board of rapid transit commissioners had no legal right to pay or compromise the claim of said parties.

The defendants, on the other hand, claim that said lease did not take away any legal rights secured to them under the Clark Williams lease; and further, that under the lease made January 6, 1917, the city was required to furnish them the surplus water from the canal for milling, mechanical and commercial purposes.

“The state evidently contemplated a permanent use of the

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canals, if public policy required their maintenance, but the right of the state to abandon them, or to resume the grant, was not abridged or surrendered by the lease, though it was in perpetuity." *Fox v. Cincinnati*, 33 O. S., 482 at 501.

The rights of said water users east of Broadway were not vested rights as against the state of Ohio, although such rights might be considered vested as against strangers, as held in 9 Ohio Dec. Reprint, 744. Said water users were mere licensees, and the license given to them under the Clark Williams lease was such as the state had the right at any time to terminate by the abandonment of the canal, or any portion thereof.

In the case of *Hubbard v. City of Toledo*, 21 Ohio St., 379, the court, in passing upon the rights of lessee water users, say on page 399:

"We think the plaintiff's lease did not vest in them any such claim or right. They had a mere license which the abandonment extinguished."

In the same case it was held that,

"To authorize the city of Toledo to enter and occupy a part of the Miami and Erie canal as a public highway and for sewerage and water purposes was an abandonment by the state of that part of her public canals so entered upon and occupied."

The act of 1863, and the lease to the city of Cincinnati executed thereunder, was an abandonment of the part of the canal east of Broadway, and the acts of 1911, 1913, and 1915 and the lease of 1917 executed thereunder, was an abandonment of the part of the canal west of the east side of Broadway to a point 300 feet north of Mitchell avenue. The right unquestionably rested in the state at any time to abandon the canal or any portion thereof without subjecting itself to liability to parties having surplus water rights.

"The abandonment of her canals by the state, creates no liability on her part, to respond in damages resulting therefrom to parties holding leases of 'surplus water,' under the act of March 23, 1840, 'to provide for the protection of the canals of the state of Ohio, the regulation of the navigation of tolls.'" *Hubbard v. Toledo*, 21 Ohio St., 379, Syl. 4; *Elevator Co. v. Cincinnati*, 30 Ohio St., 629.

No legal claim for the acts of the state in the abandonment of the canal west of Broadway could be asserted against the state. The defendants, however, claim that the condition under which said lease was made and has continued, placed a burden upon the city to protect them either by furnishing to them surplus water, or by paying them for the extinguishment of their rights.

The conditions under which the state of Ohio could grant a lease of the canal are contained in the acts, 102 Ohio Laws, page 168; 103 Ohio Laws, 670; and 106 Ohio Laws, 293; and the lease executed January 6, 1917. The conditions as set forth in said acts and said lease, under which the city of Cincinnati acquired the right to use and occupy the canal from west of the east side of Broadway to 300 feet north of Mitchell avenue are in substance as follows:

1. Said grant shall be made subject to all outstanding rights and claims, if any, with which it may conflict.

2. Said city shall, in the uses of said canal (for street, boulevard, sewerage, conduit or subway purposes), of all or any portion herein mentioned of such canal, shall construct or cause to be constructed an outlet for the water of said canal at a point 300 feet north of Mitchell avenue, or at the present spillway, so as not to obstruct the flow of water through the remaining part of said canal, nor injure the present supply of water for mechanical or commercial purposes.

3. Said city shall adopt and construct appropriate works for the purpose of supplying water to the lessee users of said water along that portion of the canal to be abandoned, in order to enable the state to carry out its contract with said lessee water users.

4. The city shall not cause any cessation or diminution of the supply of water to the said lessee (those along that portion of the canal to be abandoned) water users, to which they are entitled under their respective contracts or leases with the state of Ohio.

As between the acts of the Legislature and the lease itself, the acts control. The rights of the parties must be determined from the acts of the Legislature authorizing the lease, and no

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rights can accrue under the terms of the lease which are not authorized by these acts. *Cincinnati v. Distilling Co.*, — C. C. A. —; *Rosenberg v. Hollister*, 4 Ohio St., 297; *State v. Railway*, 37 Ohio St., 157.

In the instant case, the conditions under which the state could make the lease, and the conditions in the lease, were substantially the same and as set forth above. Was the city of Cincinnati under any obligation in these conditions to the lessee water users east of Broadway? Did the lease of the canal west of the east side of Broadway to 300 feet north of Mitchell avenue conflict with any outstanding rights or claims of lessee water users east of Broadway? It is true that after the shutting off and deflection of the water of the canal near Mitchell avenue on October 22, 1919, and the abandonment of the canal from the east side of Broadway to 300 feet north of Mitchell avenue, no surplus water continued to flow to the Ohio River. That fact, however, did not necessarily give rise to a claim against the city or its board of rapid transit commissioners. The act of the city in shutting off said water and taking possession of the canal, must conflict with outstanding rights or claims legally enforceable against the state of Ohio, or its lessee, the city of Cincinnati. In the Hubbard case, *supra*, Syllabus 5, and on page 395 of the opinion, it is held that a liability for such resulting damages only as would constitute a legal demand against the state, would create an obligation against the city. By the same case it is held, that surplus water lessees do not possess the legal rights with which an abandonment of the canal conflicts. The lessees of the "surplus water" occupying property west of the east side of Broadway had all expired before the water was shut off (and although the leases of the defendants east of Broadway to surplus water had not expired, the said leases to them gave them a mere license to the surplus water without imposing any obligations on the state to furnish surplus water, nor did said lease contain any of the other covenants necessary to make said lease a grant of vested interests. The state had the right at any time to terminate the license to said defendants, or after stopping the use of the canal for navigation purposes, to resume its use as a canal at any time, without incurring liability to a lessee of surplus water.

On page 398 of the Hubbard case, the court said:

“The lease for surplus water was adventitious, incidental, and therefore, necessarily precarious; and those obtaining grants thereof must be supposed to have taken them, subject to the fluctuations of tides, and the changes of time.”

In *Elevator Co. v. Cincinnati*, 30 Ohio St., 629, Syllabus 3, the court holds:

“The right to surplus water and to lease the same for private uses, is an incident of the public use of the canal for purposes of navigation. The canals of the state were authorized, constructed, and maintained for public purposes, and not to afford water power, to be leased or sold, for private use. The latter use is subordinate, and the right to the same may be terminated whenever the state, in the exercise of its discretion, abandons or relinquished the public use.”

The second condition required the city to construct an outlet for the water at the point at which it was shut off. This had been done, so as not to interfere with the flow of the water in the remaining part of the canal. “The remaining part of the canal,” can not be construed to mean the part of the canal abandoned under the act of 1863, but must be construed as meaning the remaining part of the canal not heretofore abandoned, or to be abandoned under the acts of 1911, 1913, 1915 and the present lease. Surely, after a portion of the canal has been abandoned for years, the portion so abandoned is no longer a canal. It could not have been the intention of the Legislature to impose upon a city a duty to build an expensive conduit so that private users of surplus water along a portion of the canal abandoned for many years, would alone be benefited.

If the court is right in its conclusion, that the act of 1863 and the lease thereunder was an abandonment of the canal east of Broadway to the Ohio river, and the acts of 1911, 1913, and the lease thereunder, was an abandonment of the canal west of the east side of Broadway to 300 feet north of Mitchell avenue, the remaining part of the canal would be that part of the canal beyond and north of 300 feet north of Mitchell avenue, the flow of water of which has not been obstructed. The present supply of water for mechanical and commercial pur-

poses of that remaining part of the canal has not been interfered with in any way to the detriment of those who had leases of surplus water under the lease of the canal from west of the east side of Broadway, and it would be strained construction to hold that the city would be bound to keep up a supply of surplus water for the benefit only of those who had leases of surplus water on a part of the canal not covered by the lease itself, unless the lease expressly declared that it was the duty of the city to do so. The acts of 1911, 1913, 1915, and the lease of January 6, 1917, make no express provision for the protection of the surplus water users east of Broadway. No mention in any way is made of them in either the acts or the lease. We can not come to the conclusion that the Legislature intended to cover matters which were not expressly stated in the acts. *Singluff v. Weaver*, 66 Ohio St., 621. In one of the subsequent clauses of the act of 1911, it was specifically stated that it was the duty of the city not to interfere with the flow of water along "the portion of the canal herein described," and in another clause of said act, "the part of said canal abandoned" was used.

It is a rule of construction that where the sense of a term in any clause of a statute is certain and definite, its sense in another clause will be presumed to have been intended to be the same, unless enlarged or restricted by the context, or necessarily varied to effectuate an obvious intention of the statute. See *Hubbard v. City of Toledo*, 21 Ohio St., 400. Since the obligation of the city is expressly restricted in one part of the act and lease, to the part of the canal to be abandoned, and in another part, to the portion herein described (from east of Broadway to 300 feet north of Mitchell avenue), we see no reason to enlarge the obligation of the city in other clauses to cover parts of the canal not expressly included either in the acts of the Legislature or of the lease.

In construing the original lease of 1863, in *Fox v. Cincinnati*, *supra*, page 502, the court says:

"The lease expressly provides for damages for a non-supply of water, when it is necessary for navigation, but makes none for damages for non-supply in other cases.

"The exercise of the reserved right of the state to abandon

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what are commonly known as "soft drinks" establishments is a lawful exercise of the police power possessed by said municipality, and such ordinance is a valid and constitutional enactment.

Anderson, Ormsby & Kennedy for plaintiff.

H. M. Hagelbarger, Director of Law, and *Clarence R. Foust*, Assistant Director, for defendants.

JONES, J.

This is an action brought by the plaintiff against the city of Akron, and its safety-director, and some of its police officers, in which it is sought to enjoin the defendants from interfering with the plaintiff in the conduct of his "soft drink" business in said city, or from arresting or prosecuting him for non-compliance with the ordinance of said city, which prohibits the conduct of such business without a license obtained from the safety director. It is also sought to enjoin the city from enforcing such ordinance against the plaintiff, or any one else engaged in similar business in said city, and that such ordinance be judicially declared unconstitutional, null and void.

The plaintiff avers that he has a large amount of capital invested in his business and a considerable stock of goods on hand, and that he has built up a lucrative trade, which he is in danger of losing if his business is interfered with by the defendants, and that he has no adequate remedy at law if it be destroyed.

To this petition the defendants have interposed a demurrer on two grounds:

1st. That the court has no jurisdiction of the subject matter of the action.

2d. That the petition does not state facts sufficient to show a cause of action.

In support of the first ground it is urged that injunction is not the proper remedy to stay proceedings of a criminal character, or to test the validity of penal ordinances.

That this is the general rule, supported by many authorities, may be readily conceded. But the rule is subject to this important exception, as laid down by the Supreme Court of the United States in *Dobbins v. Los Angeles*, 195 U. S., 223.

"Where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity."

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The petition alleges sufficient facts as to threatened interference with property rights, and consequent irreparable injury, as will bring the case within the exception, and the demurrer upon this ground is not well taken.

The plaintiff claims that the ordinance is an attempted unwarranted invasion of a right to conduct a business innocent in itself, in no way detrimental to the public peace, health or welfare; not subject to governmental license, or regulation, and concerning which the Legislature possesses no power or license or regulation, and has never attempted to exercise such power, or to delegate it to the municipality; that the attempt of the latter to so control the right to engage in such business is an invasion of plaintiff's rights under the Federal and State Constitutions and the Bill of Rights, and that in addition the municipality has unlawfully attempted to delegate a licensing power to the safety director and to vest him with judicial authority and discretion. It is also averred that the ordinance discriminates against this plaintiff.

The ordinance, which is incorporated in full into the petition, provides that no place shall be operated, conducted or maintained within the city of Akron, where beverages are sold without having first obtained from the director of public safety a license permitting the same, for which a fee of one dollar is to be paid. A license may be refused, under Section 4 of the ordinance, to any person of bad moral character, or who had been convicted of an offense under the laws of the state of Ohio, or any of the ordinances of the city of Akron. There are certain regulations preventing the interior of such places from being screened from view. It is provided that the license may be revoked by the safety director upon violation by the licensee of any of the provisions of this ordinance, or after his conviction of any offense against the state law or ordinances of the city.

There is no averment in the petition that the plaintiff has ever applied for or been refused a license, or that he is not one of that class of persons mentioned in Section 4, as above recited, to whom a license may be refused.

The purpose of the enactment of the ordinance is perfectly apparent. It is intended to bring the "soft drink" business (so called) within the control of the police authorities, and to pre-

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vent the engaging in such business by persons of bad moral character, or who have been convicted of violation of law.

The business of dispensing non-intoxicating beverages is innocent enough in itself.

So, for that matter, is the business of conducting a billiard room, or a junk shop, an auctioneering room, or massageing parlor, or a score or more of similar occupations. Yet it was long ago observed that on account of certain adjuncts which sometimes attached themselves to such establishments, it became desirable to subject them to the control of the public authorities, and they were thereby made the subjects of license and regulation.

A few years ago nobody would have thought that there was any occasion to bring a "soft drink" or beverage establishment within the regulation or control of the police authorities. Yet within the last six weeks, to be exact, on March 10th, 1921, the Ohio Legislature enacted a law as to "soft drink" places (by that name) by which, under a severe penalty, they are prohibited from being conducted except so that their interiors shall be in full public view.

A change has occurred in regard to these places. Doubtless the majority of them are as innocent as ever. On the other hand, it is a matter of common notoriety that in many instances they are largely places where illegal traffic in intoxicating liquors is carried on, or at least forms a part of the business, as numerous "raids," arrests and convictions manifest.

Among the citations offered by the counsel for the plaintiff are the cases of: *Sullivan v. City of Wellston*, 12 O. C. C. (N. S.), 108, decided in 1909, and *Village of Silverton v. Davis*, 10 O. C. C. (N. S.), 60, decided in 1907.

The march of events has proceeded very rapidly since these cases were decided. We have had since that day, the Home Rule amendment to the Ohio Constitution, the adoption of the charter of the city of Akron, the decision of the Supreme Court in *Yee Row v. Cleveland*, 99 O. S., 269, the adoption of the Eighteenth Amendment to the Constitution of the United States, and the enactment of federal and state statutes to effect the enforcement of that amendment.

With the admitted difficulties that surround such enforcement,

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and the various devices and ways resorted to and employed to carry on the forbidden traffic, and also with the marked change in the status of the municipalities of the state that has arisen between the dates of the Constitution of 1851 and the amendments of 1912, new conditions have arisen, which has required new legislation and interpretation thereof in accordance with existing conditions.

The court is not obliged to shut its eyes to this state of affairs. "Judicial notice" has been forcibly, if not elegantly described as being, in substance, "What everybody else knows, even the court is given credit for knowing."

There seems no good reason why, especially in the state of affairs that now prevails, "soft drink" places should not be subject to a certain amount of municipal and police regulation and control. Has the municipality, however, the authority to exercise such control and regulation?

Under the "Home Rule" amendment to the Constitution the city of Akron has adopted a charter which provides in the first section, that it may "license and regulate persons, corporations and associations engaged in any business, occupation, profession or trade; may define, prohibit, abate, suppress and prevent all things detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the city, and all nuisances and causes thereof; may make and enforce local police, sanitary and other regulations; may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the city."

It seems to the court that under its charter, if not even under the general police power, the city had the right to enact this ordinance to meet an evil of recent growth.

"Section 3 of Article 18 of the Constitution of Ohio specifically authorizes municipalities to adopt and enforce within their limits such local police regulations as are not in conflict with the general laws." *Oteanberg v. Cleveland*, 98 O. S., 282.

"Unless there is a clear and palpable abuse of power, a court will not substitute its judgment for legislative discretion. Local authorities are presumed to be familiar with local conditions, and to know the needs of the community." *Allion v. Toledo*, 99 O. S., 416.

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The Supreme Court of Ohio has fully recognized that "times have changed and we have changed with them." In a recent decision, *City of Xenia v. Schmidt*, to appear in 101 O. S., —, and reported in Ohio Law Bulletin, Vol. 56, No. 12, and Ohio Law Reporter, Vol. 19, No. 2, it was held that:

"A legislative act is presumed in law to be within the constitutional power of the body making it, whether that body be a municipal or a state legislative body."

"The presumption of validity of such legislative enactment can not be overcome, unless it appear that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution."

"Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights, and the health and welfare of the people in the community."

U. S. Supreme Court, December, 1919, in *Sullivan v. City of Shreveport*, 251 U. S., 169, 173.

The ordinance does not permit the safety director to discriminate between those applying for licenses. All are on an equal footing, except those of bad moral character, or who have been violators of the law, and all of them may be rejected. To the objection that even this delegates judicial discretion to the director, it seems sufficient to quote from the opinion of our Supreme Court in *Yee Bow v. Cleveland*, 99 O. S., 269, 273.

"The constitutional validity of the ordinance is also attacked, for the reason that the same grants to an administrative officer arbitrary legislative and judicial powers. * * * It is now generally held that quasi-judicial duties and administrative functions may be imposed upon administrative officers for the purpose of ascertaining the conditions under which the law or ordinance becomes effective."

The conclusion reached by this court is that the ordinance set out in the petition is valid and constitutional, and that the facts set forth in the petition do not entitle the plaintiff to any of the relief prayed for.

The general demurrer to the petition will therefore be sustained.

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OFFENSES UNDER THE LIQUOR LAW.

Common Pleas Court of Stark Countty.

DATESH V. STATE (two cases), ROSE V. STATE, MARKLING &
SCHATZMAN V. STATE, GLASER V. STATE, TROMMENSCHLAGER
V. STATE, MARGO & EVERETT V. STATE, MOZEA V. STATE,
VESTMEAN V. STATE.*

Decided, May Term, 1920.

Prosecution for Sale of Intoxicating Liquor—Sufficient if the Affidavit States That the Sale was Unlawful—What the Phrase "In Violation of Law" Comprehends—Second Offense Can not be Charged While Prosecution for the First Offense is Pending—Authority to Abate the Place as a Nuisance Does Not Entitle Defendant to a Jury Trial—Review of Case Trial Without Intervention of a Jury—Weight of Evidence—Violation of Order Separation of Witnesses.

1. A judgment of the court rendered in a criminal trial, without the intervention of a jury, is to be treated on review as to the weight of the evidence according to the same rules that apply to a verdict by a jury; that is, the judgment can not be reversed unless manifestly against the weight of the evidence.
2. Where the evidence is conflicting a reviewing court will always hesitate to set aside a verdict or reverse a judgment unless the same is manifestly against the weight of the evidence; and such judgment or verdict should not be reversed or set aside merely because there is an apparent conflict in the testimony.
3. Section 9 of Article XV, of the Ohio Constitution as amended, which went into effect in Ohio May 27, 1919, provides that: "The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The General Assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental or other non-beverage purposes." These prosecutions are brought under Section 13195, General Code, against the plaintiffs in error for keeping a place where intoxicating liquors are sold, furnished or given away in violation of

* Affirmed by the Court of Appeals, September Term, 1920, without written opinion but on the grounds and for the reasons contained in the opinion of Judge Day; case not taken to the Supreme Court.

law. The phrase "in violation of law" comprehends a violation of the state prohibition amendment to the Ohio Constitution. The Constitution being the supreme law, the words "in violation of law" would include the constitutional provision. It is not important what law is violated in the sale of intoxicating liquors under a charge of this character.

4. It is sufficient for the affidavit to state that the sale was unlawful, and then in the hearing of the case proof can be offered that the sales were made on Sunday, to a minor, in prohibited territory, or *any other* reason that renders the sale unlawful; and, therefore, a sale in violation of the Constitutional Amendment renders the same unlawful and thus in violation of law. If such sale is in violation of the Constitutional Amendment it is made "in violation of law." The Constitutional Amendment became effective May 27, 1919, and thereafter whoever sold or furnished liquor or gave away the same as a beverage did so in violation of law and he became liable under General Code, Section 13195 to the penalties thereof; and the Constitutional provision is to the extent mentioned self executing.
5. A second offense can not be charged and maintained against one who has been convicted of one offense, where the case involving the first offense has not been finally determined, but is pending in a higher court on error. In such case where the penalty imposed for the alleged second offense was greater than legally possible for a first offense, it is the duty of the reviewing court to remand the case to the trial court for sentence as for a first offense.
6. Where imprisonment is no part of the penalty, the fact that the court may, under the statute, order an abatement of the place as a nuisance, does not entitle the defendant to a jury trial.
7. The trial court is vested with discretion to refuse or permit the examination of a witness who has remained in court by procurement or connivance of the party calling him in violation of an order for the separation of witnesses.

American & Mills, Leahy & Snyder, Frank Sweitzer, and Charles Weintraub, of Canton, for plaintiffs in error.

Clarence A. Fisher, of Canton, *J. A. White* and *Chas. M. Earhart*, of Columbus, for State

DAY, J.

In the above named cases error has been prosecuted to the criminal court of the city of Canton, wherein the plaintiffs in error seek to reverse the judgment of that court, finding them guilty of violation of the liquor laws of the state.

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These cases involve practically the same questions and were presented by counsel in argument at the same hearing, and the court will group them, insofar as the law is concerned.

In each case the defendant is charged with having violated G. C. Section 13195, which recites in substance as follows:

“Whoever keeps a place where intoxicating liquors are sold, furnished or given away in violation of law, shall be fined not less than one hundred nor more than five hundred dollars, and, for each subsequent offense shall be fined not less than two hundred dollars nor more than five hundred dollars. The court, on conviction for a second or subsequent offense, shall order the place where such liquor is sold, furnished or given away in violation of law, to be abated as a nuisance, or shall order the person convicted of such offense to give bond payable to the State of Ohio in the sum of one thousand dollars, with sureties to the acceptance of the court, that such person will not sell, furnish or give away intoxicating liquor in violation of law, and will pay all fines, costs and damages assessed against him for violation of the laws relating to the sale of intoxicating liquors. The giving away of intoxicating liquors, or other shift or device to evade the provisions of this section, shall be unlawful selling.”

An examination of the record in each case discloses that the various defendants made motions and demurrers, and upon convictions filed motions for new trials and in short, saved every legal question in every way known to criminal practice; but a comparison of the various cases and a consideration of the questions presented amounts to about this: Is the judgment of the court below in each, any or all of the cases presented against the manifest weight of the evidence? Second, assuming that there was a sale, furnishing or giving away of liquor, does the evidence disclose that the defendants were keepers of a place where intoxicating liquors were sold, furnished or given away in violation of law? Third, in those cases wherein a second offense is charged, is there in contemplation of the law a second offense, so long as the first offense is pending on error to determine the fact as to whether or not the act complained of is an offense at all? Fourth, was it error to deny a jury trial to certain of the defendants?

Without reviewing in detail the evidence in the separate cases, it has been carefully considered, and from an examination of the records in the several cases I have reached the conclusion that in each of them there is sufficient evidence to warrant the judgment of conviction by the criminal court.

I have considered the question simply from the standpoint of a reviewing court as to whether or not each and all of these records have sufficient therein upon which the trial court having heard the witnesses and seen them, weighed and considered their testimony, in the light of their demeanor, manner of testifying, the appearance, conduct of the accused upon the stand and their testimony, and the various witness, to warrant the conviction, or more properly whether the conclusions of the court below were manifestly against the weight of the evidence, and that the judgments should be set aside therefor. The rule for a reviewing court in a criminal case has been set down by our Supreme Court and by the Court of Appeals in the following cases:

Stewart v. State, 1 O. S., 66 (77):

“I have, I believe, waded through all the objections taken for the plaintiff in error. While the courts should take care that persons accused of crimes are secured in all their legal rights, it is due to the community to see that those substantially charged with crime, and found guilty, should not escape punishment by reliance upon technicalities and forms, multiplying the chance and holding out the prospect of immunity to guilt as an inducement to venture in the commission of crime. We see no error in the proceedings of the court in the case before us.”

Hess v. State, 5 Ohio, 5:

“The especial assignment of error is that ‘the verdict of the jury is without evidence and contrary to the evidence of the case.’ If we can consider this assignment at all, it is sufficient to say that the verdict was not without evidence, nor contrary to the evidence, certainly not clearly so.”

McGatrick v. Wason, 4 O. S., 566:

“Should we disturb the finding? If it is clearly wrong we must do so. If we can only doubt its correctness we must let

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it alone. In *French v. Milliard*, 2 O. S., 53, this court said: 'We are not satisfied that the verdict of the jury was right, but this is not enough. A mere difference of opinion between the court and the jury does not warrant the former in setting aside the finding of the latter. That would be in effect, to abolish the institution of juries, and substitute the court to try all questions of fact. It must be clear that the jury has erred before a new trial will be granted, on the ground that the verdict is against the weight of the evidence.'"

Dean v. King, 22 O. S., 118 (134):

"A verdict of a jury should not be set aside by the court to which it is returned on account of any mere difference of opinion between the judge and the jury as to the weight of the testimony, but only when the verdict is unsupported by or is against the decided weight of the evidence (citing 5 Ohio, 245; 12 O., 151; 2 O. S., 44; 4 O. S., 566), and if the motion for a new trial be overruled, a reviewing court should not reverse unless the verdict (or finding of the fact if the jury be waived) is so clearly unsupported by the weight of the evidence as to indicate some misapprehension, or mistake, or bias on the part of the jury, or a wilful disregard of duties."

See also *L. S. & M. S. R. R. Co. v. Goodwin*, 12 C. D. 537; and *Neifield v. State*, 23 C. C., 246:

"The question of fact involved here was submitted to the court. It is true there is a direct conflict in the evidence. Daley, testifying what he claims about it on the one hand, and is contradicted by Neifield on the other. That is not sufficient to warrant a reviewing court in finding that the court belied in finding beyond a reasonable doubt that Neifield was guilty of the offense charged. If that were true, a great many criminal cases would have to be reversed on the ground that the judgment was not sustained by sufficient evidence. The court before whom the case is tried has an opportunity to see the witnesses, and observe their conduct on the witness stand, their candor or want of candor, and has a much better opportunity of reaching a just conclusion and determining where the truth really lies, than a court that knows nothing about the case except what appears on the written record. This rule has been recognized in *Brease v. State*, 12 O. S., 146."

See *Price v. Coblitz*, 21 O. C. C., 732, as authority for the following:

“A verdict will not be reversed on account of the admission of irrelevant testimony which had no bearing on the case, if such testimony was not prejudiced.”

Gebaur v. Vesper, 20 O. C. C., 711 (10 C. D., 820), and *Andrews v. Johnson*, 12 C. D., 692, support the following:

“*A judgment of the court without the intervention of a jury is to be treated on review as to weight of evidence, according to the same rules that apply to a verdict by jury—that is, the judgment can not be reversed unless manifestly against the weight of evidence.*” (Italics ours.)

See also, 17 C. C., 486, as authority for the following:

“Where the evidence is conflicting, the judgment of the police court judge unless manifestly against the weight of the evidence, will not be disturbed by a reviewing court.”

See *Evans v. State*, 3 C.C.(N.S.). 23, affirmed by the Supreme Court without report, 68 O. S., 700, *Baum v. State*, 6 C.C. (N.S.), 515.

Commenting on the conflict of evidence in a criminal case, Judge Peck in *Breese v. State*, 12 Ohio St., 146-156 (80 Am. Dec., 340) said:

“The jury who try a cause and the court before which it is tried, have much better opportunities to determine the credibility and effect of the testimony, and we ought therefore, to hesitate before disturbing a verdict rendered by a jury and confirmed by a court, possessing such advantages, merely because there is an apparent conflict in the testimony.”

And the court in that case, held, that,

“A judgment will not be reversed because the verdict is contrary to the evidence, unless it is manifestly so, and the reviewing court will always hesitate to do so where the doubts of its propriety arise out of a conflict in oral testimony.”

“Applying the rule of law above stated to the evidence presented in this case, we find no sufficient ground to warrant us interfering with the verdict rendered.”

The court of appeals of this district laid down the rule for

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disturbing verdicts in a criminal case, in *Andy v. State*, 36 O. C.C., 146 (19 C.C.(N.S.), 93, 94; 2 O. App., 103):

“And as a reviewing court keeping in mind the rule that the verdict of the jury should not be set aside unless it is manifestly against the weight of the evidence, we are of the opinion that the record presents a case which does not require this court to interfere with the verdict of the jury on the ground stated,”

The court trying the case has the very great advantage of seeing the witnesses, hearing their testimony, observing their demeanor and reaching a conclusion upon not only the spoken words of the witness, but his manner of testifying, his appearance and his general conduct, all of which aid the court in reaching a conclusion as to what weight should be given his testimony.

Now, the rule in a criminal case is that the evidence should satisfy the mind of the trier with the guilt of the accused beyond a reasonable doubt before a judgment or verdict so finding could be lawfully rendered. The Supreme Court of Ohio has held that in human affairs absolute certainty is not always attainable and from the nature of things, reasonable certainty is all that can be attained upon many subjects. When a full and fair consideration of all the evidence satisfies the mind to a reasonable certainty of the guilt of the accused, it is the duty of the court to so find. Of course, whenever there is only a strong probability of the guilt of the accused, it is the duty of the court to acquit.

From a careful reading of each of these records I have reached the conclusion that while the evidence is conflicting in all the cases, yet I can not say that the rule of the Supreme Court as to reversing criminal cases will permit me to do aught else than to deny the petitions in error so far as the question as to weight of the evidence is concerned.

One of the basic questions in all of these records, and a question common to all plaintiffs in error is whether or not the Constitutional Amendment which went into effect May 27th, 1919, is self-executing; or, to state the proposition somewhat differently, whether a sale made after May 27th, 1919, in the State

of Ohio, of intoxicating liquor, is "in violation of law" because it is contrary to Section 9 of the Amendment referred to, even though the General Assembly failed to enact laws "to make this provision effective." Again, is such a sale *unlawful* because it violates the Constitutional Amendment, and hence, in violation of law under Section 13195, even though the Legislature has not enacted laws "to make this provision effective" as provided in Section 9 of the Amendment? This Constitutional Amendment is as follows:

Article XV, Sec. 9. "The sale and manufacture for sale of intoxicating liquors as a beverage, are hereby prohibited. The General Assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental, or other non-beverage purposes."

As above noted, the Legislature has not enacted laws "to make this provision effective," and it is the contention of the State that when Section 13195, General Code, says "in violation of law" it comprehends a violation of the State Prohibition Amendment, to-wit, the section of the Constitution just cited.

An excellent statement as to whether or not a provision of a Constitution is self-executing is found in 12 C. J., page 729:

"It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the Legislature to render such provisions nugatory by refusing to pass laws to carry them into effect; and where the matter with which a given section of the constitution deals is divisible, one clause thereof may be self-executing and another clause or clauses may not be self-executing. Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed. That a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing; nor does the self-executing character of the constitutional provision necessarily preclude legislation for the better protection of the right secured. A constitutional provision which is merely

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declaratory of the common law is self-executing. A constitutional provision designed to *remove an existing mischief* should not be construed as dependent for its efficacy and operation on legislative will."

One of the earliest cases and one of the best considered cases upon this subject is found in 7 Howard, page 14, a Mississippi report, 5 Miss., page 2. The title of the case is *Bryan v. Williamson*. The provision of the constitution was under consideration in that case.

"The introduction of slaves into this state as merchandise or for sale shall be prohibited from and after the first day of May, 1833."

The court among other things, says:

"This is the language employed by the highest power in the state."

"In support of our first position, it is proper that we should inquire in the outset, what a constitution is, and how it operates. It is a form of government established by the people, designed for their general welfare, as a society and as individuals."

"In the language of a learned jurist, it was made 'by the people, made for the people, and is responsible to the people.' It is but the frame or skeleton of a government containing the general outline, leaving the detail to be filled up in subordination and auxilliary to the essential and fundamental principles thereby established, but it is not on that account the less binding. It is from its very nature and object the supreme law of the land fixed and unalterable, except by the power that made it. It contains only certain great principles which are to control in all legislation and extend through the whole body politic. That is, principles are of themselves laws. Constitutions do not usually provide this insurance obtained by prescribing penalties that merely declare the rule or establish the principle, which, being paramount, makes void whatever is repugnant to it, its mandates or principles, binding by a moral law. * * *"

"We may assert without the shadow of a doubt, that the convention did intend that the importation of slaves into this state as merchandise should be prohibited after the first of May, 1833, whether by force of the constitutional provision or by legislative enactment, and having so intended and declared it through the Constitution, it became as much a fundamental and

fixed principle in the Government as any other principle or provision whatever. It became by that mere declaration *proprie vigore* a law, and whether it may be supposed to be defective in not providing all the means necessary to enforce the prohibition makes no difference, providing it can by any means be carried into effect. Even if it was intended only as a mandate to the Legislature, its operation was to be on the citizens generally; it was not designed as one of those provisions which expend their full force in declaring and regulating the action of the legislative body, but its design was after that date to protect the people against a supposed evil. A time was fixed at which the evil should be prohibited; from that time it was a law in full force. The Legislature could not defeat it by removing prohibition, and this shows that it had an existing operative force; having that existing operative force it was not liable to be defeated by omission. It was one of those principles which required no legislative aid to give it strength, although some may think that its strength was susceptible of a more efficient application by legislative act. When the people prescribed the constitutional form of government, they ordained that every part of that form must have its appropriate effect; every principle is to be regarded as fundamental and self-executing. A constitution need do nothing more than declare first principles."

In line with this is the case of *Gherns v. State*, 16 Arizona, page 344:

"The prohibition amendment to the Constitution which in Section 1 prohibits the manufacture in or introduction into the state of any intoxicating liquor and punishes any person who manufactures or sells or introduces into the state intoxicating liquors, and which declares in Section 2 that the Legislature shall, by appropriate legislation, provide for carrying into effect of the amendment and which provides in Section 3 that the amendment shall take effect and be in force after January 1, 1915, is, when considered as a whole, self-executing, and Section 2 merely imposes on the Legislature the duty of enacting appropriate legislation for enforcement of prohibition; 'appropriate' meaning suitable, fit, befitting, proper.

"Constitution, Article XXII, Section 21, requiring the Legislature to enact all necessary laws to carry into effect the provisions of the Constitution, grants no power to the Legislature, and the duty it seeks to impose exists without the provision.

"A self-executing provision of the Constitution does not necessarily exhaust legislative power on the subject, but any

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legislation must be in harmony with the Constitution and further the exercise of constitutional right and make it more available.”

To the same effect is *State of New Mexico, ex rel Lozenzo Delgado, v. Eugenio Romero, Treasurer*, 17 New Mexico, page 81:

“The last clause of Section 1, of Article X of the Constitution of New Mexico, which reads as follows: ‘And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county,’ is self-executing.

“The mere fact that legislation might supplement and add to or prescribe a penalty for the violation of a self-executing provision of a constitution, does not render such a provision ineffective in the absence of such legislation.

“If a constitutional provision, either directly or by implication, imposes a duty on an officer, no legislation is necessary to require the performance of such duty.”

To the above may be added *People, ex rel Ely, v. Rumsey*, 64 Ill., page 44:

“A constitutional provision designed to remove all existing mischief should never be construed as dependent for its efficacy and operation upon legislative will.”

I think authorities could be multiplied to show that when the Constitution through the voice of the people has spoken against an existing mischief and declared its fiat against the same, that this becomes the fundamental law of the land, and if, after a certain date, the doing of a certain act is prohibited, then to do that act is to transcend and to break the highest law ordained by the people, to-wit, the Constitution, and nothing more is needed to make the same any more unlawful than the very word of the Constitution itself.

Also see Cooley’s *Constitutional Limitations* (7th Ed.), p. 121, where the following is found:

“A constitutional provision may be said to be self-executing if it supplies a sufficient rule or means by which the right given may be enforced or protected, or the duty imposed may be performed.”

This is the view entertained by the Attorney-General in an opinion rendered May 5th, 1919, wherein this language is used:

“While the question is much encumbered with doubt, I advise that until the question has been judicially determined, the provision of the prohibition amendment may be looked to as furnishing the definition for unlawful sales as contemplated by the provisions of Section 13195, General Code, providing a penalty for the keeping of a place where the liquor is sold in violation of law.”

After May 27, 1919, the selling, giving or furnishing of intoxicating liquor as a beverage was prohibited by the Constitution and the General Assembly were authorized to enact laws “to make this provision effective.” Suppose the legislature met immediately for that purpose, after that date, and upon the statute books they found Sec. 13195 which says that

“Whoever keeps a place where intoxicating liquors are sold, furnished or given away in violation of law shall be fined, etc.”

Would it make it any more in violation of law or unlawful to enact another statute?

Now, if the Constitution was the highest law of the land, then whoever sold, furnished or gave away liquor after that date did so in violation of law. This expression “in violation of law” as used in Sec. 13195 has been judicially determined in this state in many cases, its first construction being in *Lynch v. State*, 12 C. C. (N.S.), page 330; affirmed without report, 81 O. S., 489, page 333. Judge Donahue, now upon the Federal bench, uses this language:

“It is not important what law is violated in the sale of intoxicating liquors under a charge of this character. It is sufficient for the affidavit to state the sale was unlawful, and then in the hearing of the case proof can be offered that the sales were made on Sunday, to a minor, or person in the habit of becoming intoxicated, or in territory where the sale of intoxicating liquor is prohibited or any other reason that renders the sale unlawful.”

And what is contemplated in the language “in violation of

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law'' appears in the case of *Herman v. State*, a well considered opinion by Judges Donnelly, Kinder and Crow in the circuit court of Allen county, which was affirmed in the supreme court without report, 88 O. S., page 584. This case involved a sale to minors. The same expression "in violation of law" as used in Sec. 13195, has been considered in *Saunders v. State*, 20 C.C.(N.S.), page 395; *Post v. State*, 14 C. C., 111; *Pfaff v. State*, 1 Ohio App., Rep., 306, 20 C.C (N.S.), 395.

The language of General Code, 13195, as to "unlawfully keeping a place" for sale of intoxicating liquors is not limited to dry territory, but includes unlawfully keeping a place on Sunday.

Again adverting to 12 C. C. (N. S.), page 333 the court uses this language:

"It is sufficient for an affidavit to state the sale was *unlawful*, and then in the hearing of the case proof can be offered that the sales were made on Sunday * * * or any other reason that renders the sale *unlawful*."

The provision in the amendment to the Constitution prohibiting a sale of intoxicating liquors can hardly be regarded otherwise than a reason that renders the sale of such liquors unlawful; under said amendment the sale of intoxicating liquors is either lawful or unlawful. There can be no neutral ground. If the Constitution is the supreme law of the land, then such sales in violation of such Constitution makes such sales not lawful, and if the sale is not lawful, then it must be unlawful; hence, "in violation of law" for that is the legal definition of the word "unlawful." Therefore, the conclusion must follow that if such sale is in violation of the Constitutional Amendment, it is made "in violation of law."

Now if the Legislature found Sec. 13195 upon the statute books of Ohio, which provided a penalty for the keeper of a place where liquors were sold "in violation of law" and if any one who did so sell after that date violated the highest law of the state, to-wit, the Constitution, in so doing, what further act of the Legislature was necessary? Again, another view of

this amendment is that the same is effective without a penalty being enacted; C. J., Vol. 16, Sec. 29 states:

“The doctrine is well settled that where a statute either makes an act unlawful, or imposes a punishment for its commission, that is sufficient to make an act a crime without any expressed declaration to that effect.”

And in Sec. 30, after stating that it has been held in some cases that the mere defining of an act necessary to constitute a crime does not make such act a crime unless punishment is annexed it is said:

“On the other hand it is held where the statute prohibits any matter of public grievance or commends a matter of public convenience, although no penalty is prescribed for disobeying its prohibition or commands, an indictment will be sustained.”

Authorities could be added to the principle that a crime may be complete without the penalty annexed thereto, insofar as the unlawfulness of the act is concerned. I am therefore constrained to the conclusion, considering this question from any standpoint, that the Constitutional Amendment became effective May 27, 1919; that whosoever “sold or furnished liquor or gave away the same as a beverage after that date, did so in violation of law, and that he was liable under Sec. 13195 to the penalties thereof.

That such a provision, as the one under consideration, is self-executing is supported by the following authorities and cases cited therein. 33 Am. & Eng. Ann cases, 1116; 7 Eng. Ann cases, 627; 16 L. R. A., 281-282.

Coming now to some of the questions involved in the various cases, I take up the one as to whether a former conviction on which error has been prosecuted, but not finally determined, can be made a basis of a charge of a second offense.

This question arises in the record in two cases—that against Constantine Vestimean, and one of the cases against Nick Datesh. In the first of these cases, to-wit, Vestimean, there appears a stipulation as follows (on page 27 of the record):

“It is admitted by counsel for the defendant that the de-

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fendant, Constantine Vestimean, from the 15th of July to the 8th day of September, 1919, was charged with keeping a place where intoxicating liquors were sold, contrary to Section 13195 and that on September 12, 1919, the said defendant plead guilty to said charge and was fined \$300 and the costs of prosecution, and that the defendant, Constantine Vestimean, is the same Constantine Vestimean as in the former case.”

And it further appears that no error was prosecuted for that judgment; hence, there can not be said to be an error proceeding pending to the first conviction. In the one case against Nick Datesh the record discloses that during the pendency of the error proceedings to the first conviction, the second was had and an order of abatement made. As to this case of Nick Datesh I am unable to agree with counsel for the state that a conviction is a conviction until reversed upon error, although there is some authority to that effect, but in 16 C. J., page 1341, Sec. 3155, is found this language:

“Since the word conviction when made the ground of some disability or special penalty means a final adjudication by judgment in a jurisdiction where it is necessary for a conviction to precede the commission of the second or subsequent offense in order to inflict the enhanced penalty following a second conviction, it has been held that sentence must be pronounced on the former conviction and that the judgment thereon must become final. 224 Pa., 363.”

Now, the record discloses that in this case Datesh was fined \$500 and the order given to abate the place. He might have been fined the \$500 under a first offense. So that, if the order of abatement was eliminated and the judgment of the court below reversed to that extent, this judgment might stand under the fine of \$500. The practice, would, however, seem to be to remand the case to the trial court for a resentencing, under the authority of *Pickett v. State*, 22 O. S., 405, 4th Syl. and *Carey v. State*, 70 O. S., 121. This matter of the abatement of the place is no part of the penalty, insofar as the sentence is concerned, for G. C., Sec. 13195 recites for a first offense—

“shall be fined not less than \$100. nor more than \$500. and for every subsequent offense shall be fined not less than \$200 nor more than \$500.”

The section then goes on to recite that upon a conviction for a second or subsequent offense, the court shall order the place where such liquor is sold, etc., to be abated as a nuisance. Hence the conviction of Datesh was rightful enough under the evidence and the sentence as to the amount of the fine within the statute, but in my opinion, insofar as the same seeks to order an abatement of the place as upon a second offense, I believe the judgment to that extent should be reversed and the cause remanded for a new sentence.

Now, as to the defendant Vestimean, no such a situation arises in his case; there was no error proceeding pending to his first conviction, there was final judgment thereunder and the order of the abatement was entirely proper under G. C., Sec. 13195.

This brings me to a consideration of the question as to whether or not the court erred in denying certain of these defendants trials by jury, and the authority relied upon is found in *Sanders Post & Pfaff v. State*, 1 App., Rep., page 306 and 20 C. C. (N.S.), page 395. On page 398 in the latter citation, after discussing the provisions of the General Code with reference to hearing cases of this character without the intervention of a jury, the Court of Appeals used this language:

“That, upon a second conviction, the defendant’s place may be abated as a nuisance and the constitutional right to a jury trial would then accrue to him, and that by force of the second, therefore, need not now be discussed, for obvious reasons. A second offense was not charged.”

Now, in the Ohio App. Rep., the language is somewhat different and on page 311 the following is the language:

“Upon a second conviction, the defendant’s place may be abated as a nuisance and the constitutional right to a jury trial would then accrue to him, which, therefore, need not now be discussed for the obvious reason that a second offense was not charged.”

So that, in the C. C. (N. S.), language the words “that,” and that “by force of the second,” do not appear in the Ohio App. Rep. language.

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A consideration of the record in this case of *Sanders et al v. State*, the facts upon which the same arose and the holding of the court as set out in the syllabus of both reports indicate that no holding is made to the effect that a jury trial is essential when the court considers a second conviction. I am inclined to think that the report in the 20 C. C. (N. S.), was an opinion taken down at the time of the announcement and the language of the court would indicate, to my mind, that there was intended to be said, after discussing the right to a trial by jury

“That (as to the question) upon a second conviction the defendant’s place may be abated as a nuisance and that a constitutional right to a jury trial would then accrue to him, and that by force of the second (conviction), therefore, need not now be discussed for obvious reasons. A second offense was not charged.”

It is very apparent, to my mind, that the court in that case was expressly not determining the question as to whether a jury trial was necessary upon the hearing for a second offense. The language used would seem, to my mind, to expressly disclaim an intention of passing any opinion upon that subject or discussing it, as they say, for the obvious reason that no second offense was charged. There was no reason in the case for the discussion of this matter, as the court itself admits, and no reason or argument is given as to why the defendant should have a jury trial upon a second conviction, under G. C., Sec. 13195.

The only basis that I can see for granting a jury trial in a second conviction is, that part of the penalty may involve the abatement of the place and hence, a taking of property, necessitating the intervention of a jury trial in order to comply with the constitutional provision “by due process of law.” “The constitutional right to trial by jury applies only to cases in which the prerogative existed at common law or was secured by statute at the time the constitution was adopted; and not in those cases where the right and the remedy with it are thereafter created by statute, nor where the cause was already a sub-

ject of equity jurisprudence.” 16 R. C. L. (Ruling Case Law), pages 194, 195.

A solution of this problem, therefore, rests upon the question as to whether or not in the abatement of a nuisance by order of court, the intervention of a jury trial is a constitutional right. 20 R. C. L., page 484, uses this language:

“In the case of public nuisances where the application is for an injunction only, no damages being demanded, it seems to be settled that constitutional guarantees do not require a trial by jury.”

In Woollen and Thornton, the Law of Intoxicating Liquors, page 256, this language:

“Not only has the state the power to regulate or prohibit the sale of intoxicating liquors, but it has the power to declare that the keeping of them—even though not for sale, it would seem—and the buildings wherein they are kept, shall be deemed a nuisance. In Iowa, a statute provided, if in either a civil or criminal case, the existence of a nuisance be established where intoxicating liquors was involved, the court should enter a judgment abating the nuisance and direct a seizure and destruction of the liquor and a removal and sale of the fixtures and furniture used on the premises held for either the manufacture or sale of the liquor. This was held to be a valid statute. ‘The appellee,’ said the court, ‘contend that though they did create and maintain nuisances as alleged, no decree should be entered against them for the seizure and destruction of their liquors, nor for the removal and sale of furniture and fixtures, because the law authorizing the same is in conflict with Amendments IV and XIV to the Constitution of the United States, and Sections 8 and 9, Bill of Rights, and Article III, Constitution of Iowa. Their contention is that property of an individual can not be confiscated or forfeited by legislative enactment, but only by the judgment of a court, in accordance with due process of law, and that by said laws the Legislature forfeits the property in question and does not leave such forfeiture to the court; that property can not be forfeited by an action against the person, but must be by action against the thing, and that in a criminal case for nuisance the property is not involved, and that the defendant is entitled to his day in court upon the question of forfeiture of his property. We understand the law to be that property of individuals can not be

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forfeited by legislative enactment; that such forfeitures can only be by the judgment of a court of competent jurisdiction, in a proper case, after due notice. This statute does not forfeit property by legislative enactment, but, as in many other instances, authorizes and requires the courts, in cases where it has been established upon judicial investigation that property is such, or has been so used, as to constitute a nuisance, to abate the nuisance by destroying and selling the property. It is only by the judgment of a court that any person may rightfully destroy liquors found upon the defendant's premises described, or removed therefrom and sell the furniture, fixtures, etc., therein. In actions, either criminal or equitable, wherein the existence of a nuisance is established under the law in question, the action is against the thing in the place, as well as against the persons. In either case the question is whether the place was a nuisance, and, if so, then whether the person was engaged in keeping it. Such actions are against the thing, as well as the persons, and the person has due notice, and his day in court, in which to defend against the forfeiture of his property as well as the punishment of himself.' The abatement may be authorized by proceedings in chancery. The Legislature may even authorize a municipality to declare the keeping of liquors to be a nuisance.'"

In the case of *Mugger v. Kansas*, 123 U. S. Rep., pages 623-672, after discussing the 13th section of the Kansas act with reference to abatement of places where liquors are manufactured and sold contrary to law, is this language:

"Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisance,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances strictly so called, but also to purprestures upon public rights and property * * *. In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information, also, lies in equity to redress the grievance by way of injunction.' 2 Story's Eq. pa. 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than

can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. (Authorities cited.)

“As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance.”

The basic distinction should be recognized that when an action is maintained at law for damages caused by the creation and maintenance of a nuisance, a jury trial should be had for the purposes of measuring the damages to which the plaintiff may be entitled—that constitutes a taking of property within the meaning of the constitution and was a right recognized by the common-law; but in cases of this character, when the thing itself is determined to be a nuisance and the action is against the keeper of the place for the maintaining of the nuisance, the abatement is directed against the maintenance of the place as a place where liquor is sold unlawfully and this calls for the exercise of a chancery jurisdiction, to-wit, to stop the unlawful procedure and to abate the place, insofar as it is maintained as a place for the unlawful sale of liquor. It is not an action for damages but is in the nature of an injunction, to restrain the further violation of law in the maintenance of the so-called nuisance. Without multiplying authorities upon this proposition, I have reached the conclusion that in the trial of a second offense, when the court, pursuant to the state, has ordered an abatement of the place as a nuisance, a jury trial is not a constitutional right to which the defendant is entitled. Hence, I am constrained to the conclusion that these petitions in error, insofar as Vestinean and Datesh are concerned, should be denied upon that point, to-wit, the right to a trial by jury.

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In the Trommenschlager case there is a point urged that a confession was introduced before the proof, the *corpus delicti*, but an examination of the evidence as presented in the bill of exceptions does not convince me that the case is beyond the principle as recognized in the case of *Kohn v. State*, 14 C. C. (N. S.), page 31 which holds:

“In the prosecution for arson, a judgment of guilty will not be reversed because of failure to establish the *corpus delicti*. Evidence tending to incriminate the defendant was introduced where the burning of the property was not disputed and the same evidence which established criminal agency also bore upon the question of the guilt of the accused.”

The proof of the essential elements going to make up the crime charged might concurrently appear, together with the proof of the alleged confession, and on page 5 of that record it appears without objection:

“I asked him if he was the sole proprietor and he said he was the sole proprietor. That is all.”

Of course, later on in the record, objection appears to have been made, but having already admitted the testimony without objection, this point is futile to the plaintiff in error, and in any event, I doubt whether it transcends the rule of the Knapp case, even if everything that the plaintiff in error claims in the premises should be granted, for it is inherently so much a part of the proof of the *corpus delicti* that no valid claim can be made for a reversal upon that ground.

In the case against Margo two witnesses, one George Schild and John Heilman were called upon the part of the defendant to testify.

As to Schild, an objection was made in the trial court upon the ground that there was an order for separation of the witnesses for the State and defense made before the introduction of the testimony, said order having been made at the beginning of the trial.

Now, I think it is conceded that certain witnesses in question remained in the room with the full knowledge of counsel

for defendants during the taking of the testimony on the part of the State, and that likewise it was well known by court and counsel upon both sides and the witnesses, that an order had been made excluding all persons, who expected to testify in the case, from the room.

The law in the State of Ohio, I think may be stated as follows:

“It is error, affording ground of reversal, to exclude evidence of a witness upon the ground that he had remained in court during part of the trial, and had heard other witnesses testify, and in so doing had violated an order of the court for the separation of the witnesses, neither the prisoner nor his counsel having encouraged such violation, and the witness being ignorant of the order: *McHugh v. State*, 42 O. S., 154, IV Longsdorf's Notes, 100.

“While the court is vested with discretion to refuse or permit the examination of a witness who has remained in court, by procurement or connivance of the party calling him, in violation of an order for the separation of witnesses, it is vested with no such discretion to prevent such examination where there has been no such procurement or connivance.” *Dickson v. State*, 39 O. S., 73, 111 Longsdorf's Notes, 1009.

So that the underlying question is whether or not the court abused his discretion in the premises in refusing these witnesses to testify after he had made the order, with full knowledge of counsel and parties in the premises. If the court believed that the remaining in the room of these witnesses after his order had been encouraged or allowed or procured or connived at by the parties calling them, in violation of his order for separation, he then had a right in his discretion to refuse to permit them to testify. A determination of such question must largely be left to the trial judge, for he saw all persons, knows what took place in his court room and in his presence and of the conduct of counsel and parties in the premises. The court below seems to have reached the conclusion that the remaining in the room of these witnesses was with knowledge and consent of the counsel in the case, and if such were the facts, I could not set aside the verdict for the refusal of the court to permit the witnesses to testify. Necessarily, much discretion

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must be placed in the hands of the trial court, and unless this discretion is abused, a judgment should not be disturbed upon that ground. Both of these witnesses were more or less clearly associated with the defendant Margo and were habitués of his place of business, and they were in attendance upon the trial, doubtless, for rendering such assistance as might be necessary. Counsel informed the court, when the order of separation was made, that they did not know that they would put them on; hence, they knew that these two, Heilman and Schild, were in the room, during the progress of taking testimony, after the court had made the order. It would seem to me that counsel might well have anticipated that if something during the progress of the state's testimony should develop which they, two habitués of Margo's place, might know something about, they would be more or less important witnesses. Hence, the safer plan by far would have been to have excluded them with the other witnesses, and then if it should develop that their testimony was desired, there would be no disability connected with their testifying.

It might well be argued that it was hardly fair to the state to permit such persons, who might or might not be witnesses, to remain in during the taking of the testimony, and then, if anything developed which they might be used to rebut, to put them on. The entire circumstance surrounding the conduct of the trial leads me to the conclusion that the court below was within the McHugh and Dickson cases cited above.

Again, the record discloses by the offer to prove as to the witnesses Schild and Heilman that these witnesses would testify that of their own knowledge they knew there was no liquor upon the premises in question in the month of September, or words to that effect. Now, this would be highly important testimony, and yet the excuse offered for not excluding them from the room, when the court ordered, was the fact that counsel were uncertain as to whether or not they would call either of these witnesses. Now, if the witnesses would have testified to the highly important fact as to whether liquor was on the premises or not in the month of September, and counsel were uncer-

tain as to whether to call them or not, either there was a lack of confidence in the witnesses themselves or the court was right in his conclusion that they had remained in the room with the knowledge of the parties and their counsel, and hence, was within the rule as laid down in the Dickson case.

I believe I have touched upon all the chief points in the records, all voluminous, and it may be there are some I have not reached in expressing my views, but I believe that the essential claims have been reviewed. The basic question is not a new one in this state and many similar cases have arisen involving this and other questions. Judge Smith in Jefferson County Court of Common Pleas on January 19, 1920, rendered a very able opinion construing this statute, and the constitutional rights of the various plaintiffs in error, as appeared in the records presented to him. The questions were entirely similar and he reached the conclusion that the judgments of conviction should be sustained.

I am, therefore, of opinion that none of these judgments of conviction in any of these cases, excepting the second case against Nick Datesh, should be disturbed, and they are therefore affirmed. As to the second case against Nick Datesh, the same is reversed insofar as the abatement order is concerned and the cause remanded to the criminal court of the city of Canton for a re-sentencing. In all other respects the judgment is affirmed.

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SALES OF MACHINERY ON APPROVAL.

(Judge Duncan of Hancock county sitting by invitation).

Common Pleas Court of Hardin County.

**J. B. STAMBAUGH and J. F. STAMBAUGH v. THE CANTWELL
HARDWARE COMPANY.**

Decided, April Term, 1917.

*Sales—When Title Passes When Made on Approval—Application of
the Statute—Rescission Must be Tendered—Or no Basis Exists for
Action Thereon.*

1. A machine sold with the express understanding that it will work well or it will not have to be paid for; that it will work satisfactorily; that it will do the work or the purchaser will not have to keep it, is a sale on approval under Rule 3 (2) of Section 8399 of the General Code, and the property therein does not pass until the purchaser signifies his approval to the seller or does some other act accepting it.
2. Under such contract, if no rescission has been tendered, no action lies in favor of the purchaser for breach of warranty; first because rescission is the exclusive remedy under the terms of the contract; and second, because "satisfaction" has no money value.

*Mahon & Mahon and Armstrong Stambaugh for plaintiffs.
Stillings & Dugan and Stickle & Cessna, for defendants.*

Duncan, J.

This action is for damages for breach of warranty of quality in the sale of a gang plow.

The plaintiffs are farmers and owners of a large farm in this county, a great portion of which is muck land. The defendant runs a hardware store in the city of Kenton, and, in connection therewith, sells agricultural implements.

On or about April 10, 1914, the defendant sold the plaintiffs one J. I. Case engine gang plow on trial for the sum of \$700, with the express understanding that "it would work on muck land or it would not have to be paid for;" that "it would work satisfactory;" that "it would have to do the work or the plaintiffs would not have to keep it." The plow was delivered about ten days later and the plaintiffs began to operate it in the muck

but with poor success. The plaintiffs thereupon gave the defendant notice of the failure of the plow to work successfully and two men with expert knowledge on the subject came on from the factory to adjust the plow to the conditions and to assist in its operation for a test. At their suggestion some new attachments were made and installed on the plow, and while this improved its operation somewhat, it still would not work well.

About the middle of May, while this situation existed, the defendant made demand for payment of the \$700, but was informed by the plaintiffs that the plow was not giving satisfaction, whereupon the defendant assured them that if they paid for the plow then they would have the same protection as before; that if the plow did not do satisfactory work their money would be refunded, and the plaintiffs paid the \$700 with this express understanding.

The representations as to its operation in the muck were made to induce the purchase and were relied upon by the plaintiffs in the transaction. It never did give satisfaction or work well in the muck, though a good plow for general purposes.

From one hundred and fifty to one hundred and seventy-five acres were plowed on this trial when the plaintiffs decided it would not do the work and could not be made satisfactory, and purchased another plow. They were delayed somewhat in putting out their crop, but no special damage resulted. Had the plow measured up to these representations, it would have had a value of \$700; its real value was \$500.

This is a statement of the facts upon which the plaintiff's action for damages is founded. Ordinarily, where one sells personal property to another and there has been a breach of the warranty as to quality, the purchaser has the option of one of two remedies, viz, he may rescind by a return of the property or keep the property and sue for damages. See 8449, G. C., *Crooks Co. v. Eldridge-Higgins Co.*, 64 O. S., 195. But this option does not arise in case of conditional sales or a sale depending on a condition precedent. This was not an executed sale. It was not to be a sale unless the plow would work in the muck, and prove satisfactory to the plaintiffs as the result of a trial;

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and unless it did, the plaintiffs would not be required to keep it. They made no tender of rescission, and the right to damages is excluded by the contract.

This for three reasons. First, there was no warranty but a condition precedent upon which the sale was to be complete. Second, to treat the plow as purchased under the contract, its acceptance is conclusive that it *would* work in the mud and *was* satisfactory. Third, "satisfaction" with reference to the operation of a machine is not capable of measurement in money.

1. Rule 3 (2) as laid down in Section 8399 of the General Code provides that

"When goods are delivered to the buyer on approval or on trial or on satisfactory or other similar terms, the property therein passes to the buyer when he signifies his approval or acceptance to the seller or does any other act accepting the transaction."

Benjamin on Sales (5th Ed.), 319, lays down the rule in this way:

"Where the buyer is by the terms bound to do anything as a condition, either precedent or concurrent, upon which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."

And the Supreme Court in *Hayner v. State*, 83 O. S., 178, at page 193, after quoting the above from Benjamin on Sales makes this observation:

"Nor would it be delivery until the buyer had determined to accept, the rule being that an acceptance by the purchaser is as necessary an incident to delivery as a tender by the seller."

To illustrate the point the court refers to the case of *Bonham v. Hamilton*, 66 O. S., 82. In this case a promissory note with "approved security" was to have been given by the buyer for the property purchased. The seller did not approve the security. The first paragraph of the syllabus reads as follows:

"It is a general rule that, in case of the sale of goods, if nothing remains to be done on the part of the seller, as between him

and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that is the price to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done."

I think the distinction is made clear between a condition precedent and an executed sale in *Hunt v. Wyman*, 100 Mass., 192. That was an action for the purchase price of a horse. The defendant was told by the owner that the horse was six years old, sound, kind, and afraid of nothing but goats, whereupon he proposed to the owner that "if he would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it," to which the owner assented and turned the horse over to the defendant's servant. But before it reached the defendant's place, it escaped from the servant, ran away, and was injured so seriously that it could not be used or removed prudently, and there was no opportunity for the defendant to try it. The court held:

"Upon the facts stated in this case, there was a bailment and not a sale of the horse. The only contract, aside from the obligation implied by law, must be derived from the statement of the defendant, that, if the plaintiff 'would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it. * * * An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

The one is an option to buy, if the property proved satisfactory, and the other an option to return if unsatisfactory. 35 Cyc.. 289.

Williston on Sales makes the distinction in this way:

Section 270. Rule 3. *Sale or return, or sale on approval.* It is evidently possible for the parties to agree that the buyer shall temporarily take the goods into his possession to see whether they are satisfactory to him, and that if they are not he may refuse to become owner. It is clear also that the same object may be obtained by an agreement that the property shall pass to the

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buyer on delivery, but that he may return the goods if they are unsatisfactory. The first kind of bargain is called in the Sales Act a sale 'on approval,' or 'on trial,' or 'on satisfaction.' The second kind is called a bargain 'on sale, or return.' * * * The question is one of fact in every case whether the parties intended to make approval a condition, without which the property should not pass, or whether their intent was that the property should pass at once with the right to return the goods."

See also to the same effect: *Sturm v. Baker*, 150 U. S., 312 (37 Law, 1093); *Gottlieb v. Kinoldo* (Ark.) 93 S. W., 750 (6 L. R. A., N. S., 273); *Wiggins v. Tunlin*, 96 Ga., 753 (23 S. E., 75); *Rumpf v. Barto*, 10 Wash., 382 (38 Pac., 1129); *Kahn v. Klau-bunde*, 50 Wis., 235 (6 N. W., 838); *Wind v. Iler*, 93 La., 316 (27 L. R. A., 219); *State v. Betz*, 207 Mo., 589 (106 S. W., 64); *Osborne v. Francis*, 38 W. Va., 312 (18 S. E., 591); *Davis Case E. Works Co. v. McHugh*, 115 Ia., 415 (88 N. W., 948).

Here, too, is the proposition that it is for the purchaser to say whether the operation of the machine is satisfactory. That the machine works well and the purchaser *ought* to be satisfied with it is not sufficient. The only qualification as to his conduct in this respect is that he must act in good faith. He is the sole arbiter of his own satisfaction, provided that any dissatisfaction on the part of the purchaser must be real and not feigned. *Campbell Printing Press Co. v. Thorp et al*, 36 Fed., 414 (1 L. R. A., 645); *Brown v. Foster*, 113 Mass., 126.

In *Wood R. & M. Machine Co. v. Smith*, 50 Mich., 565, it was held that where the vendor of a harvesting machine gave a warranty that the contract of purchase should be of no effect unless the machine worked to the buyer's satisfaction, it was held that the purchaser had reserved the absolute right to reject the machine and that his reasons for doing so could not be investigated.

In *McCormick H. Mach. Co. v. Chesrown*, 33 Minn., 32, plaintiff agreed to furnish defendant a cord binder guaranteed to work satisfactorily. It was held that in case, upon reasonable trial, it did not work satisfactorily, it was unnecessary for the defendant to return it to plaintiff, but it was sufficient for him, within a reasonable time, to notify the plaintiff, in substance, that it

did not work satisfactorily, and that he declined to accept it. See also 2 Elliott on Contracts Sec. 1605, and cases there cited.

2. To treat the plow as purchased, it follows that it was purchased under the contract. The plaintiffs can not convert the bailment into a sale under any other conditions than those specified in the bailment, viz., that the plow would work well in the muck and that they would be satisfied with it. Their election to keep it, therefore, would effect an agreement that the plow was satisfactory and would conclude them as to this fact.

This case is entirely unlike the case of *Smart v. Teeple*, 18 O. C. C. (N.S.), 544. In that case a horse was sold under a warranty and one of the conditions of the sale was that the purchaser, if not satisfied with the horse upon trial, *might* return him the next day and receive his money back. It was held that this was an optional condition; that where the language is permissive and not mandatory, the purchaser, at his option, may avail himself of the speedy remedy of rescission or waive it and sue at law for the breach of warranty. The distinction is explained in *Hunt v. Wyman*, 100 Mass., 198, and other authorities already referred to, as a sale with *right to return* as opposed to a sale *upon approval* as a condition precedent. It is also distinguished in the same way from *Eyers v. Hadden*, 70 Fed., 648.

3. "Satisfaction" has no money value. In *Campbell Printing Press Co. v. Thorp et al*, 36 Fed., 414 (1 L. R. A., 645), the plaintiff agreed to sell the defendants certain printing presses and guaranteed that the presses should be "free from defective material or workmanship, and should do their work satisfactorily." The action was for the price and the defendants sought to recoup by way of damages for breach of warranty. The referee to whom the case was referred found that neither of the presses were satisfactory to the defendants; nor did they do their work reasonably well; yet he found as a conclusion of law that the plaintiff was entitled to recover the full contract price, upon the theory that it was the duty of the defendants to reject the presses if they were not satisfied with them, but having kept them there was no method of estimating the loss they suffered by rea-

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son of their dissatisfaction; in other words, that the value of a press that would work to their satisfaction, was not capable of pecuniary estimation. This holding was affirmed and the reasons therefor approved in an extended opinion by Judge Brown, concurred in by Judge Jackson, both of whom afterwards became Justices of the United States Supreme Court.

From the facts of this case and the law applicable thereto, as I view it, the plaintiffs' remedy was to tender back the plow and sue for the return of their money. The contract under which the plow was delivered, as well as the one under which the money was paid, is to the same effect, and the rights of the parties are fixed thereby. There will be a finding for the defendant. A motion for a new trial will be overruled and judgment entered on the finding. Exceptions.

INVALIDITY OF DEED EXECUTED BY ONE UNDER GUARDIANSHIP.

Common Pleas Court of Montgomery County.

A. J. FIORNI AND ARTHUR E. LEEN, GUARDIANS, V. SIMEON A. GOSS ET AL.

Decided May 18, 1921.

Guardian and Ward—What Appointment of Guardian for an Incompetent Imports—Deed Executed by the Ward Without Force or Effect.

The appointment of a guardian for an aged man on the ground of incapacity to care for his property imports a finding by the court of such infirmity, and a transfer of property by him after such an appointment has been made is void and may be set aside and the title quieted to the property thus sought to be conveyed.

SNEDIKER, J.

The plaintiffs in this case were on the 18th day of February, 1920, appointed guardians of the estate of Joseph B. Butt, who was on that day found by the probate court to be incapable of taking care of his property, and therefore, a proper subject of guardianship. An entry of the appointment is on file in the probate court endorsed as of February 18, 1920.

In his old age, and but nine days before a guardian was appointed for him, Butt married a wife, and it was with an idea of protecting him against any possibility of her securing his estate through his susceptibility as well as for the general reason of protection to him, that these guardians were appointed. Notwithstanding the appointment of February 18, 1920, Butt and his wife entered into negotiations with the defendant, Simeon A. Goss, for the sale of a tract of land belonging to Butt situated in Miami township, this county. As a result of these negotiations there was executed and delivered by Butt and his wife by themselves individually, and without the knowledge or interposition of Butt's guardians, a deed to the property in question. There was an investigation made of the title to this property by Goss, through his counsel, and it was not discovered that Butt was under guardianship. Goss made his check to Joseph B. Butt for the purchase price in the sum of \$967. Butt, as had been anticipated, endorsed the check to his wife, Sally, who collected the check and disappeared, and her whereabouts has to this time been unknown, and no benefit actually accrued to Butt by reason of the transaction. No part of the purchase price ever came into the hands of his guardians. The whole affair was without authority, knowledge, consent or order of the probate court.

These plaintiffs now come into this court for the purpose of having the deed made by Butt to Goss set aside and the title of their ward quieted in the real estate in question. The plaintiffs were appointed guardians under Section 10989 of the General Code which provides:

"Upon satisfactory proof that a person resident of a county, or having legal settlement in any township thereof, is an idiot, or imbecile or a lunatic or an incompetent by reason of advanced age or mental or physical disability or infirmity, the probate court shall appoint a guardian for such person," etc.

This section formerly was modified by an act passed April 27, 1872, which provided, among other things: "That such appointment shall be regarded only as *prima facie* evidence of imbecility." But the act last mentioned was repealed, and

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there was at the time of the appointment in this case, no such qualifying provision. The law was as we have first stated it.

When the probate court made its finding on February 18, 1920, it was entitled to full credit. As said by Black (referring to the 16 O. S., p. 45) in his work on Judgments, at Section 645:

“The action of the proper court in making appointment of a guardian, is also invested with the character of conclusiveness. Thus in Ohio plenary and exclusive original jurisdiction is given by law to the probate courts in the matter of appointment of guardians, and that jurisdiction attaches in any given case whenever application is duly made for its exercise therein. Such proceedings are not inter-parties or adversary in their character, but are properly proceedings *in rem*, and the order of appointment made in the exercise of jurisdiction binds all the world, and the record showing nothing to the contrary, it will be conclusively presumed in all collateral proceedings that such order was made upon full proof of all the facts necessary to authorize it.”

It is, therefore, not our privilege to inquire in this case as to the propriety of such appointment. These guardians having been appointed, what was the effect thereof?

In the 31 O. S., at page 247, in the body of the opinion, Judge McIlvaine says: “The estate of an insane person passes to his guardian by relation as of the date of the adjudication of insanity, as in case of a deceased person it passes to the executor or administrator as of the date of the death.”

In the 39 O. S., pp. 58-61, Judge Doyle says:

“The general power of a guardian over the real estate of his ward is to manage it for the best interest of the ward and to receive and account for the rents and profits. He may lease it but not beyond the term of the guardianship. He can not sell or convey any part of it. The power to sell and convey must be conferred by statute. The jurisdiction of courts of chancery to order the sale rested upon statutory provision. A guardian has no power in this state, where the subject is regulated by statute, to sell the estate of his ward except by order of the probate court in a proceeding properly instituted for that purpose.”

It may be said that when the court upon inquiry finds a guardian to be necessary for the estate of any particular person, it takes charge of his property and appoints one who manages it for the best interest of the ward under its supervision and control. In this state a sale of the real estate of the ward at any time after the appointment may only be made after application pursuant to the statute and when authorized by the court.

The case at bar is not like the case of *Hosler v. Beard*, in the 54 O. S., at page 398, which was quoted by counsel for the defendants. At the time the note in that case was signed by Beard he had not been adjudged an imbecile. When there has been no such adjudication the rule is that where the state of mind of the imbecile was unknown to one contracting with him and no advantage was taken of the imbecile, the defense of imbecility can not prevail especially where the contract is not merely executory, but executed in whole or in part and the parties can not be restored altogether to their original positions. Where there has not been such a finding by a court one dealing with a lunatic may reasonably suppose he is sane and make a bargain with him on that assumption, and if no unfair advantage is taken of him the contract may stand.

As said by the Supreme Court of New Hampshire, 48 N. H., 133: "Where a person apparently of sound mind and not known to be otherwise, enters into a contract for the purchase of property which is beneficial to the purchaser and otherwise fair and *bona fide*, and which has been fully completed, paid for and enjoyed, and can not be restored so as to put the parties in *statu quo*, such contract will not afterwards be set aside either by the lunatic or his representatives." But when a guardian is appointed he thereupon becomes vested with the control of the property of his ward and he alone is capable of transferring it. *It is the appointment of a guardian which works the change in the legal power of an imbecile to act for himself.*

As said by Judge Taft in the case of *Jordan, Guardian, v. Dickson et al*, 19 W. L. B., p. 64:

"The due appointment by the probate court of a guardian

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for a person as an idiot, imbecile or lunatic is conclusive evidence of such person's incapacity to make or ratify contracts to do any act in derogation of his guardian's authority pending guardianship."

The Court of Appeals of New York, 116 N. Y., pp. 67-73, say:

"All contracts of a lunatic, habitual drunkard or person of unsound mind made after an interposition and affirmation thereof are absolutely void until by permission of the court he is allowed to assume control of his property. In such cases the lunacy record, as long as it remains in force, is conclusive evidence of incapacity."

In 105 Mo., pp. 431-454, the Supreme Court of that state say in the opinion::

"But the law is settled in our state that a contract made by an insane person in ward is absolutely void; but that a contract made by an insane person not in ward is only voidable, and that courts will not set it aside without restoring the parties to their original position."

In 92 Federal Reporter, p. 811, the court holds:

"The deed of a person under guardianship by reason of incapacity to manage his own affairs in consequence of habitual drunkenness is void."

At section 255 Black, in his work on Rescission and Cancellation, says:

"The rule almost universally prevailing in modern times is that the contracts as well as the deeds and conveyance of a person who is actually insane at the time, but not judicially so adjudged, and not under guardianship, are voidable for that cause, on equitable principles, but not absolutely void." And at Section 259, he says: "And judicial determination that a given person is insane when reached in a direct proceeding for that purpose, such as an inquisition of lunacy or other appropriate proceeding, is not only a judgment *in rem*, such as to give constructive notice of the fact to all the world, but also it raises conclusive presumption that the person is incompetent to enter into any binding contract or make a valid deed.

In the case of *Carter v. Beckwith et al*, 128 N. Y., 312, the first syllabus is:

“One who has been judicially determined to be a lunatic and for whom a committee has been appointed is incapable of entering into a contract, and any contract he assumes to make is absolutely void.”

In the 3 Ky. Reports, p. 659, the case of *Pearl v. McDowell*, the first syllabue is:

“After office found contracts of idiots or lunatics are void.”

In the 8 N. Y. Reports, p. 338, the case of *Wadsworth v. Sharpsteen et al*, the court of appeals say:

“After one has by inquisition been found an habitual drunkard he may not until it is vacated or a commission therein supersede, even in his sober intervals, make contracts to bind himself or his property.”

In the case of *Reynolds, Appellant, v. Gerner*, 80 Mo. Rep., p. 474, the Supreme Court hold:

“The deed of an insane person after being placed under guardianship will be absolutely void, and the guardianship is conclusive respecting the disability of the ward whether he be insane or not; and it is immaterial from what cause his insanity resulted, whether from old age, sickness, habitual drunkenness or other causes whatever. The assent of a guardian of an insane person to the latter's deed confers upon that instrument no element of validity.”

In 84 Mo. App. p. 332, the court say:

“The judgment of a probate court adjudging a person insane and appointing a guardian is conclusive in regard to such person's competency to make ordinary contracts, and render such contracts absolutely void.”

If Butt's deed be held to be void it may be said by counsel for defendants that some equity ought to intervene on behalf of Goss, because he is an innocent person. Replying to this suggestion, Black in his work on Rescission and Cancellation, at Section 254, says: “The doctrine that where one of two innocent persons

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must suffer, the loss should fall on him who made the condition possible, has no application to cases where it is sought to set aside a deed on the ground of the insanity of the grantor, for an insane person can not be held responsible for consequences which he could not understand or prevent."

The appointment having been made under a petition which averred that Butt was incompetent by reason of advanced age and mental infirmity, to take care of and preserve his property, we are led to the conclusion that the court so found, and it is not difficult for us to make application of the decisions heretofore quoted. On the whole we are constrained to find that the plaintiffs are entitled to the relief prayed for in their petition, and an entry may be drawn accordingly.

**SERVICE OF SUMMONS UPON ONE WHO HAS
BEEN EXTRADITED.**

Common Pleas Court of Cuyahoga County.

ANNA LOTZ V. HARRY LOTZ.

Decided, May 11. 1921.

Summons—May be Set Aside when Served on One Who has been Indicted—Good Faith in Bringing the Accused into the Jurisdiction does not Validate Summons in a Civil Suit.

1. A non-resident charged with crime and brought within this jurisdiction by compulsory process is exempt from service of civil process while coming into the jurisdiction, while necessarily in attendance upon the court, and while returning to his place of residence, provided no unnecessary delay occurs in returning.
2. The fact that the criminal prosecution was instituted in good faith does not vary the rule to render valid service made upon such non-resident witness so within the jurisdiction.

KRAMER, J.

It appears in this case that the plaintiff and defendant were married in the state of Pennsylvania, and lived there for some eighteen years. On account of differences which arose between

them, the plaintiff left the defendant, established a residence in Ohio, and brought this suit against the defendant for divorce and alimony. The defendant has at all times maintained his domicile and residence in the state of Pennsylvania.

Subsequent to the filing of this action, upon the complaint of the plaintiff herein, the defendant was indicted by the grand jury of Cuyahoga county, for neglect of his minor child, and was extradited into this jurisdiction. He was duly brought to trial, and found guilty.

When the defendant was brought into this jurisdiction, he was confined in a county jail, and while so confined, he was served with summons in this action.

The defendant now moves the court to quash the summons and service so made.

The issue raised is whether summons can legally be served in a civil action upon a resident of another state who has been brought into this state by extradition to answer to a criminal charge, while the defendant is in jail awaiting trial upon such charge, the complainant in the criminal action and the plaintiff in the civil action in which service is sought to be made, being the same person.

The facts show that the criminal prosecution was instigated in good faith, so that the question of fraud in procuring extradition for the purpose of serving summons in the civil action is not in this case.

The question so raised, as above noted, does not appear open to discussion in this state. In the case of *Compton, Ault & Co. v. Wilder*, 40 O. S., 130, the syllabus is:

“W., a citizen of Pennsylvania, was extradited from that state, upon a requisition issued by the governor of Ohio, upon application of C., A. & Co., in a criminal prosecution instituted by them in Hamilton county. *Held*, that the service of a summons and an order of arrest, issued in a civil action brought by C., A. & Co. against W., and made upon W., directly after he had entered into a recognizance to appear before the court of common pleas, at its next term, and before conviction, and before he had an opportunity to return to his home, was rightfully set aside.”

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The plaintiff attempts to avoid the authority of this case, by alleging that the decision was based upon the proposition that the extradition was procured by fraud, and points to the language of the court in the opinion, on page 133. Both the syllabus and the opinion of the court appear to negative this claim. The court says nothing in its statement of the facts, indicating that it finds that there was any actual fraud in the extradition of the defendant, Wilder, and it appears that he had not yet been tried upon the criminal charge upon which he was extradited, when this decision was rendered. If there is any consideration of the question of fraud in the case, it is found in the holding of the court that the service by Compton, Ault & Co. in their civil action was in bad faith, when made while the defendant was in this state by virtue of the extradition process. On pages 132 and 133 the court says:

“In this case, this machinery was set in motion by Compton, Ault & Co., by their application to the Governor of Ohio. Good faith upon the part of these applicants, and good faith upon the part of Ohio, toward the surrendering state, demanded that Wilder, having been by force brought into Ohio for a specific purpose, should not be deprived of any rights except such as he had forfeited by the commission of the alleged crime * * *.

“It was bad faith in Compton, Ault & Co. to commence a civil action, and attempt to serve a summons and order of arrest therein, upon Wilder, before conviction, and before he had an opportunity to return to his home. It would become bad faith in this state if her courts should make such service effective.”

The foregoing case is cited by our circuit court, in the case of *Wm. B. White v. Arthur G. Marshall*, 3 O. C. C. (N. S.). 495, at page 498, where it is said:

“It has been determined in this state, by the highest court, that if a non-resident is charged with crime, and brought within the jurisdiction of the court by compulsory process, he is exempt from service of civil process, while coming into the jurisdiction, while necessarily in attendance upon the court, and while returning to his place of residence, provided no unnecessary delay occurs in returning. (*Compton, Ault & Co. v. Wilder*, 40 O. S., 130.) The authorities at the present time

are quite uniform in holding upon this question, and many of the authorities state that the bringing of such action is unlawful. They mean, however, nothing more by that, than if the defendant objects to the jurisdiction of the court over him, he is entitled to have the summons in the case dismissed as to him, and if a *capias* has been issued and served, he is entitled to have the same set aside, and it is not intended to say that it is unlawful, because it is prohibited by positive law, nor in that sense."

There is nothing in this language to suggest that the circuit court considered that actual fraud, or bad faith, was involved in the decision of the Compton case.

The authorities in the different states are not uniform upon this question, and the case *Ex parte Henderson*, Supreme Court of North Dakota, 145 N. W. Rep., 574, cited by the plaintiff herein, shows the rule in Dakota to be different from that in Ohio. The court, in that case (p. 577) recognizes that there are two opposing lines of authority, and cites the Compton case, *supra*, among the cases which it recognizes as being contrary to its holding.

The motion to quash service is, therefore, granted.

Plaintiff, Anna Lotz, excepts.

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VALIDITY OF ORAL AGREEMENT FOR CONVEYANCE OF LAND.

Common Pleas Court of Hamilton County.

**EDGAR STARK, EXECUTOR AND TRUSTEE UNDER THE WILL OF
MARY ANN BRITT, DECEASED, v. DAISY ORR TURNER.***

Decided, April Term, 1921.

Home Given to Niece as Wedding Gift, but no Deed Passed—Recovery of Possession Sought by Heirs of the Donor Twenty Years Later—Competency of Declarations Made by Donor in Her Lifetime—Statute of Frauds Not Applicable to Oral Agreements for Conveyance of Land, When—Laches.

1. Declarations made by a deceased donor of land are competent when offered by the donee in defense of his title, but contrary statements by the donor fall within the prohibition of self-serving declarations and are inadmissible in evidence.
2. An oral agreement for conveyance of land is taken out of the statute of frauds and is enforceable in Ohio where there has been a part performance; and possession, even without the making of improvements, is such part performance, the only requirement being that whatever has been done shall be clearly referable to some contract relating to the specific land.
3. A party in possession can not be charged with laches, and where permanent improvements have been made and taxes and assessments paid by him, his failure to assert title until suit has been brought to dispossess him of the property does not give validity to the claim that his assertion of title was not made seasonably.

Hackett & Yeatman, for plaintiff.

Buchwalter, Headley & Smith, for defendant.

MATTHEWS, J.

The plaintiff, claiming to be the legal owner and entitled to the immediate possession of the east half of lot No. 107 of the Rose Hill Park Subdivision, Cincinnati, Hamilton county, Ohio, filed his petition in this case to recover possession thereof from the defendant, and for mesne profits.

* A similar judgment was entered in the Court of Appeals on the reasoning and authorities found herein.

The defendant filed an answer and cross-petition, and in her cross-petition alleged, among other things, that the plaintiff's testatrix in her life time, in contemplation of the defendant's marriage, made a gift by parol of said real estate to the defendant, placed the defendant in possession, which possession the defendant had held for about twenty years, during which time she and her husband had made permanent improvements on said real estate and paid the taxes and street assessments.

The prayer of the cross-petition is, that the court decree specific performance of said parol gift, and that the defendant's title to said lands be quieted against the claim of the plaintiff.

The plaintiff replied denying the gift, and alleging the defendant had been guilty of laches.

Clara Dixon and Blanche Partridge McCarty, beneficiaries under the will of Mary Ann Britt, and entitled to one-third of the estate, have been made parties and have joined in the prayer of the petition. The other beneficiaries entitled to two-thirds of the estate, have conveyed their interest, if any, to the defendant.

The cause came before the court upon the issues raised by the defendant's cross-petition, evidence was offered, and said issues were submitted for decision by the court upon the law and the facts.

At the trial the court admitted evidence of declarations by Mary Ann Britt, the plaintiff's testatrix, offered by the defendant to prove the intention to make the gift. The court excluded evidence offered by the plaintiff of declarations made by said testatrix during her life time, the purport of which was that she spoke of the real estate in question as her property.

In admitting these declarations offered by the defendant, and excluding those offered by the plaintiff, the court followed the rule laid down in the early case of *Tipton v. Ross*, 10 Ohio Rep., 273, in which the court at page 274 said:

"While one holds the title, the admissions he makes may be given in evidence against him and against his privy. The heir, pursuing the estate of his ancestor, takes his right and interest, incumbered by all that rests against it, before descent. If this deed had been set up against John Ross, the father, while hold-

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ing the land, his own admissions would have been competent evidence; they are equally competent when offered against his heir.”

Such declarations are only admitted in evidence as admissions against interest, and the declarations of an ancestor or testatrix are admitted in evidence against the person who is seeking to assert a right in the stead of the ancestor or testatrix; such ancestor or testatrix standing thus in privity with the litigant asserting the right, the declaration stands on the same basis as though the litigant himself had made it. It is therefore admissible against, but not in favor of such party.

In the case of *Ogden v. Dodge County*, 97 Ga., 461, the court had before it the double aspect of a case under facts almost identical with that of the case at bar, and held as stated in the syllabus:

“Declarations by a donor of land in favor of his own title, made after he has delivered possession of the same to the donee, are not admissible in evidence against the latter. Declarations of a donor against his title and in favor of that of the donee bind the donor and his privies in estate, and consequently are admissible in the donee’s favor against one who derived title from the donor after the declarations were made.”

The same rule was applied in the recent case of *Hayes v. Hayes*, 136 Minn., 389. And the same rule is stated textually in 22 Corpus Juris, 356 and 357, under division IX, which is headed “Admissions” commencing on page 296. In defining admissions on page 296, the author says:

“More accurately regarded, they are statements by a party or someone identified with him in legal interest, of the existence of a fact which is relevant to the cause of his adversary.”

At pages 356 and 357 the author classifies the declarations of a predecessor in title as a species of admissions or declarations against interest.

So it is the opinion of the court that these declarations of Mary Ann Britt during her life time were only competent as admissions against interest in favor of the defendant, and when

her declarations were offered by the plaintiff standing upon her rights they fell within the prohibition of self-serving declarations, and were therefore incompetent.

The basis of the admission of declarations by a prior owner of real estate was stated by our own Supreme Court in the recent case of *McAdams v. McAdams*, 80 O. S., 232 and 236.

The defendant asserting a right against the personal representative of the decedent to have her title quieted against the claim of the decedent's estate, and to have a specific performance of an oral agreement decreed, the degree of proof required as stated in the case of *Merrick v. Ditzler*, 91 O. S., 256, is:

“If the defense is made by the personal representatives of a deceased person, the contract, whether in writing or parol, must be established by clear and convincing proof.”

Without stating in detail the evidence, but testing it by the degree of proof required, the court has concluded that the evidence offered proves the following facts:

That in the spring of 1899 the defendant was engaged to be married to William L. Turner, and in contemplation of that marriage Mary Ann Britt, who was the defendant's aunt, made up her mind to give to the defendant a home as a wedding present, and in pursuance of that intent after having inspected several houses, concluded to give to the defendant the house and lot which is the subject matter of this action. Accordingly Mary Ann Britt and the defendant went to Albert H. Mitchell and negotiated for the purchase of the house. At the time of the purchase Mrs. Britt stated to Mr. Mitchell that she was buying it to give to the defendant; and at the time of the execution of the deed gave as a reason for the insertion of her name as grantee, not that she was postponing the gift, but that for certain personal or family reasons the purchase was being consummated in the name of Mrs. Britt. Immediately upon the purchase of this property the keys were delivered to the defendant, and she and her husband took possession and have held uninterrupted and exclusive possession ever since. The defendant was married on May 31, 1899, and she and her husband have ever since occupied the property and used it in the same sense

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that absolute owners occupy and use property. The title on the tax duplicate standing in the name of Mrs. Britt, the tax bills went to her, but the defendant's husband regularly reimbursed her for the taxes paid, and in addition paid all street assessments. The evidence also shows that they have kept the premises in repair, and in addition thereto have expended money in improvements and betterments of a kind that would be done by the owner of property, but not by a tenant. During the early years of the occupancy of this property by the defendant, the defendant and her husband contemplated buying the west half of the lot of which the premises in question are a part, and at that time Mr. Turner went to Mrs. Britt and told her that he contemplated buying the west half of the lot, but owing to the building restriction preventing only one house being constructed upon a lot, that he hesitated about buying the west half because of the legal title to the east half not standing in the name of his wife; thereupon Mrs. Britt told him that the east half belonged to the defendant, that she had given it to her, and that he should have no uneasiness about it, and to go ahead and buy the west half of the lot, which he thereupon did.

Shortly before Mrs. Britt's death, as well as at various other times between 1899 and 1910, Mrs. Britt stated to other persons that she had given this property to Mrs. Turner, that the reason she did not execute and deliver a deed was that she did not want certain of her relatives to know of the gift, and that she had prepared a deed transferring the property to the defendant, which was to be delivered to her upon the death of Mrs. Britt. However, neither this deed to the defendant, nor the deed from the Mitchell estate to Mrs. Britt was found among her papers after her death, and at that time the record title to the property still stood in the name of the Mitchell estate, although there had been a transfer upon the tax duplicate from the Mitchell estate to Mrs. Britt.

This evidence by witnesses whose trustworthiness the court can not doubt, shows that there was a gift *in praesenti*, and a delivery of possession of the subject matter of the gift to the donee, who has ever since been in exclusive and uninterrupted

possession, acting with reference to the property as an absolute owner would.

The question before the court is as to the rights of the parties under the circumstances. It is urged by the plaintiff in the first place, that the defendant is seeking to enforce an oral agreement for the transfer of an interest in land, and that this is prohibited by Section 8621, General Code, being a part of our statute of frauds. The defendant has answered that taking possession with the attending and following circumstances is such a part performance as takes the oral agreement out of the statute.

That taking possession is such a part performance as will take an agreement out of the statute of frauds, we find was so firmly settled as early as 1824 as to cause the Supreme Court in *Wilber v. Paine*, 1 Oh., 248 at 256, to say:

“It has frequently been held on the circuit, that the delivery of possession, on a parol agreement, was sufficient to take it out of the statute, and we see no reason to reverse the rule or to reject the principle on which it is founded.”

In *Waggoner v. Speck*, 3 Ohio, 293, at 294, the court upon this subject says:

“It has become the settled construction of our statute for the prevention of frauds and perjuries, that the delivery of possession is such a species of part performance as may take a case out of the statute, when the effect of it is not controlled by other facts connected with the case.”

And in *Grant v. Ramsey*, 7 O. S., 158, at 167, the court discussing this subject says p. 166:

“No distinction is made by the terms of the statute, between leases for years, estates for life, or in fee simple; nor between leases for a term not exceeding one year, and those for a longer term. All estates or interests in lands, are placed on the same footing, and it is certain that contracts for the absolute sale of lands, in fee simple, are constantly held by our courts to be taken out of the operation of the statute by part performance, and that a change of possession and part payment will constitute a sufficient part performance for this purpose. The clauses of our statute relied upon in this case, are but a re-enactment of the English statute upon the same subject, and the courts of

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that country have always regarded leases, without regard to their duration, as taken out of the statute by part performance."

Many cases are referred to and the subject discussed at length in the case of *Gramann v. Borgmann*, 14 N.P.(N.S.), 449. At 457, the court in discussing what constituted such a part performance as will take the case out of the statute, says:

"It is not necessary, at least in this state, that the acts of part performance be referable to the contract which is set out, and to no other contract whatever. It is sufficient if they 'clearly refer to some contract in relation to the subject-matter in dispute; its terms may then be established by parol.' "

So that the rule deducible from these authorities is that an oral agreement for the conveyance of an interest in real estate is enforceable in Ohio where there has been a part performance; and that, contrary to the decisions in many states, a taking possession even without improvements, is such a part performance as will take the case out of the statute; that the only requirement of part performance is that what is done shall be clearly referable to some contract relating to the specific land, and that thereupon oral evidence is admissible to show what the actual contract between the parties with reference to that land is.

The court therefore concludes that the taking possession of this property by the defendant, and holding it exclusively and uninterruptedly constitutes such a part performance as takes the contract out of the statute of frauds, and that therefore the defendant's action is not barred by that statute.

It is also urged that the defendant has not shown that she is entitled to relief in equity, for the reason that the agreement to transfer the title and the actual transfer of possession was in fact a gift, and that therefore in as much as a contract to be enforceable as such must be supported by a consideration, neither a court of law nor equity will aid the defendant.

If the defendant's cause of action is dependent upon proof of an originally enforceable contract, it certainly fails, because it is conceded that the intention to transfer this property and the ac-

tual transfer of its possession to the defendant was purely voluntary on the part of Mrs. Britt.

The rule is too fundamental to require a citation of authorities that an unexecuted gift is unenforceable, and that an intention to give in order to be binding must be followed by delivery. Till then no gift has been made and as no consideration passes to the donor no legal obligation exists to consummate the transaction. In the opinion of the court however, the case at bar does not fall within this general rule. The evidence shows that Mrs. Britt intended to make a gift of this property and she did deliver the property to the defendant; the only unperformed part was the execution and delivery of the deed, so as to vest the legal fee simple title in the defendant.

Many cases have been before the courts where donees of gifts of land followed by delivery of possession have been protected where it would be inequitable to permit the donor to disturb the donee in the possession of the premises given. This remedy does not compel the execution of a gift but prevents the revocation of a gift. The gift has already been made, and the remedy in equity in such case is to prevent the donor from using the power vested in him, because of the retention of the legal title, to disturb the donee in the enjoyment of the executed gift.

The reasons underlying the decisions are clearly stated in the case of *Trebesch v. Trebesch*, 130 Minn., 368, at 370 and 371.

“To constitute a valid transfer of land by verbal gift, there must be a gift completely executed by delivery of possession, and performance of some acts sufficient to take the case out of the statute of frauds. The performance necessary for this purpose must be an acceptance, a taking of possession under and in reliance upon the gift, and the doing of such acts in reliance thereon that it would work a substantial injustice to hold the gift void. *Snow v. Snow*, 98 Minn., 348, 108 N. W., 295; *Hayes v. Hayes*, 126 Minn., 389, 148 N. W., 125.

“3. It was said in one case: ‘The whole doctrine (of part performance) rests upon the principle of fraud.’ *Brown v. Hoag*, 35 Minn., 373, 29 N. W., 135. In another case it was said there must be something to impute to the vendor ‘wrongful intent which alone furnishes an occasion for the interference of equity to enforce verbal agreements.’ *Townsend v. Fenton*, 32

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Minn., 482, 21 N. W., 726. Other cases rest the doctrine on the ground of estoppel rather than fraud. *Jorgenson v. Jorgenson*, 81 Minn., 428, 84 N. W., 221; *Snow v. Snow*, 98 Minn., 348, 108 N. W., 295. But the difference is mostly one of names. The ground upon which the remedy rests is in reality that of 'equitable fraud'; not an antecedent fraud consciously intended by the donor in making the gift, but a fraud inhering in consequence of setting up the statute, for it would be a virtual fraud for the defendant, after permitting the acts of part performance to interpose the statute as a bar to the plaintiff's remedial right. 4 Pomeroy, Eq. Jur., Sec. 1409; *Horn v. Ludington*, 32 Wis., 73. This does not differ much from the doctrine of estoppel, for although fraudulent intent is not an essential element of the conduct working an equitable estoppel (*Diamond v. Manheim*, 61 Minn., 178, 63 N. W., 495), yet in every case of equitable estoppel 'it may with perfect propriety be said that it would be fraudulent for the party to repudiate his conduct, and to assert a right or claim in contravention thereof.' 2 Pomeroy, Eq. Jur., Sec. 805; *Brown v. Hoag*, 35 Minn., 373, 29 N. W., 135."

Other cases showing instances in which a donor has been prevented by a court of equity from revoking the gift by asserting the legal title, are: *Curts v. Hibner*, 55 Ill., 514; *Haggerty v. Haggerty*, 172 N. W., 259 (1a.); *Hayes v. Hayes*, 126 Minn., 389; *Steinman v. Clinchfield Coal Corp.*, 240 Fed., 561; *Ungley v. Ungley*, 4 Chancery Div., 73.

In most of the states the law is that possession alone is not such part performance as will take the agreement out of the statute of frauds, and for that reason we find in most of the cases a discussion of the subject of improvements taking the agreement out of the statute along with and frequently inextricably commingled with a discussion of a change of the status quo rendering it inequitable to permit the donor to assert his legal title and thereby disturb the donee in the possession of the gift. Improvements on the land are all important in those states but in Ohio they are only pertinent as one of any conceivable number of circumstances reflecting upon the equity of permitting the donor to disturb the donee in the possession of the property.

Tested by the rule announced in these cases, not as to what is such part performance as will take an agreement out of the statute because Ohio has its own rule on that subject, but by the

rule established in those cases as to when in good conscience the defendant should be restrained from revoking or limiting the extent of a gift, the plaintiff upon equitable principles is barred from disturbing the defendant in the possession of the premises in question. The intention to give was clearly proven; the marriage in contemplation of which the gift was made, took place; exclusive possession was immediately taken by the defendant, and such possession has continued uninterruptedly to the present time; while the possession has continued the defendant and her husband have expended money upon said property in various ways, and in the opinion of the court it is not a sufficient answer to say that the rental value during the time equalled or exceeded the expenditure. If that were a sufficient answer then a donee of land having made valuable improvements immediately on taking possession, and having thereby acquired a title which would be protected in equity, would by continuing in possession until the rental value exceeded the value of the improvements, have his title withdrawn from the protection of a court of equity.

Furthermore, in the case at bar, in addition to the other changes of position, relying upon this gift the defendant and her husband purchased the adjacent half of lot No. 107, a circumstance which in itself would make it inequitable to permit the donor to revoke the gift.

It is argued that assuming that the defendant was entitled at one time to protection by a court of equity, that she has lost this right by failure to assert it seasonably. Upon this claim of the plaintiff it is to be noted that the defendant has been in possession of this property all the time, and that never until the institution of this action to recover possession has she been disturbed in that possession.

A party in possession can not be charged with laches; this is stated in the text of Pomeroy's Eq. Jur., Vol. 4, 4th Ed., Section 1454, in this language:

“A party in possession of land who resorts to a court of equity to settle a question of title is not chargeable with laches, no matter how long his delay. Such a party is at liberty to wait until his title is attacked before he is obliged to act. The most

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frequent illustrations of this principle are found in suits by parties in possession to remove a cloud on title or to quiet title."

The author cites many cases in the note in support of the text.

The conclusion to which the court has come is that the evidence proves a gift of the land in question; that it would be inequitable, under the circumstances, to permit the plaintiff to revoke this gift or limit its duration by the assertion of the legal title, and that therefore a court of equity will decree a transfer of the legal title from the plaintiff to the defendant, and quiet the defendant's title against the plaintiff's claims.

A decree may be prepared in accordance with this opinion.

STREET ASSESSMENT IN EXCESS OF ONE-THIRD OF VALUE OF PROPERTY AFTER IMPROVEMENT.

Common Pleas Court of Franklin County.

SADIE C. BELCHER V. CITY OF COLUMBUS ET AL.

Decided, November 15, 1920.

Columbus Charter Construed—With Reference to Filing Objections to Street Assessments—Failure of Property Owner to Act Within Two Weeks—Does Not Render Valid an Excessive Assessment.

The charter of the city of Columbus provides that an owner of any lot who does not file objections in writing with the city clerk to the apportionment of an estimated assessment against said lot, within two weeks after the service of notice of such proposed assessment, shall be deemed to have waived any objection to such assessment to the extent of the amount estimated. The charter also provides that in making such assessments the council shall limit the same to the special benefits conferred upon the property so assessed, and that in no case shall there be levied on any lot or parcel of land assessments for any and all purposes, within the period of five years, in excess of 33 1-3 per cent. of the actual value thereof after the improvement is made. Plaintiff's lot was assessed more than one-third of its actual value and, although served with notice as required by the city charter, she did not file objections within two weeks thereafter.

Held, that plaintiff's failure to object within the two weeks period does not empower the city authorities to assess her lot in excess of 33 1-3 per cent. of its actual value after the improvement is made, and that plaintiff may by injunction prevent the city from collecting any part of such assessment in excess of one-third of such actual value.

Belcher & Connor for plaintiff.

H. L. Scarlett and Charles A. Leach for defendants.

Rogers, J.

It appears that the city of Columbus, by proceedings regular on their face, improved a public street in said city, known as Kenworth Road. Thereafter, and within five years, the city also improved another public street in said city known as Orchard Lane. Plaintiff's lot abutted upon and is located at the southwest corner of the intersection of the two streets, and was assessed for their improvement within the five year period and in the order named. Plaintiff by her suit seeks to enjoin the collection of the assessment for the improvement of Orchard Lane as against her said lot on the ground that the two assessments are in excess of thirty-three and one-third per cent. of the actual value of the lot after the improvements.

Defendants deny that the assessments are in excess of one-third of the value of the lot as claimed and further charge, in substance, that the improvements were made pursuant to the provisions in the charter—Columbus being a chartered city—regulating such matters; that the charter provides that after declaring the necessity by council for such improvement the matter is referred to its chief engineer to make and report the estimated amount of the assessment against each lot to be benefitted, and thereafter notice to all owners of lots is given of the estimated assessment, and any owner so to be assessed is required to file his objection thereto within two weeks after notice, and "any owner who fails to do so is deemed to have waived any objections to such assessment to the extent of the amount estimated; that the matter for estimation by the Chief Engineer was referred and he made his report, and notice thereof

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was given plaintiff who failed to object to the estimated assessment within the time provided, and that thereafter the improvement was ordered and made, and assessment levied therefor against plaintiff's lot; and that to the extent of the estimated assessment the plaintiff had waived any objections to such assessment. It further appears that the estimated assessment for the improvement of Orchard Lane as against plaintiff's lot was \$309.45 and the actual assessment was \$366.42; and that the actual assessment for Kenworth Road was \$402.72 making the sum of actual assessments against this lot within five years, \$769.14.

The charter also provides relative to assessments for improvements, that:

"The council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied on any lot or parcel of land assessments for any or all purposes, within a period of five years, in excess of thirty-three and one-third per cent. of the actual value thereof, after the improvement is made."

Plaintiff denied that she had been notified of the estimated assessment, or that she had not objected to the same within the required period. Thereupon evidence was adduced showing that plaintiff was so notified and failed to make objections within the required time after notice of the estimated assessment against her lot. Evidence was also adduced on the proposition as to whether the sum of the two assessments exceeded one-third of the value of the land after the improvement.

On this question of fact, I arrive at the conclusion from the whole evidence that the actual value of the lot after the improvements was substantially \$1,750.00. Some witnesses gave opinions as to a much less value and others as to a much greater value. But a fair estimate from all the evidence, in my opinion of the value of the lot, is \$1,750.00, after the improvement of both streets.

The first question of law is: whether the plaintiff by failing to object to the estimated assessment is bound to pay at least that amount, even though the council which was limited by the

charter to levying any assessments, within a period of five years, in excess of one-third of the actual value against the lot after the improvements, violated such charter provision, by levying an assessment in excess of such one-third valuation. Or, putting the question in another form, does the failure of plaintiff to object to the assessment furnish license to council to levy any amount against the lot up to the estimated assessment, although such assessment may operate as a confiscation of the property itself, and operate as a taking of the property without compensation therefor in violation of the constitution in that behalf? I think it will be conceded that council will not be permitted to violate the constitution relative to the state taking private property without compensation merely because the owner may not object to some part of the proceedings of council leading up to such taking. This being so why should council be permitted to violate a charter provision which limits its action, merely because an owner fails to object to certain of its proceedings? I am persuaded that the charter inhibition is as binding upon council as is the constitutional inhibition. This leads me to the conclusion that the failure of the owner to object to the estimated assessment is only a waiver, as to the actual assessment, to the extent of the estimated assessment, provided the latter does not exceed one-third of the actual valuation after the improvement. In other words, the charter provision governing the matter of objections and waivers by the owner and the charter provision governing the extent to which council can go on levying assessments are *pari materia* and must be construed together. Otherwise the failure of the owner to object to the estimated assessment would furnish license to the council to violate the prohibitive clause against excess of assessments, even to the point of taking the property itself. This was not the purpose of the charter provision relative to failure to object. It contemplated that by failure of the owner to object to the estimated assessment, council could actually assess up to that amount, *provided it came within the limitation against excessive assessments prescribed by the charter*. Both of these provisions must be read together, so as to give effect to it in case of failure of the owner

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to object and at the same time to limit the extent of council's action in making the assessments to one-third of the value of the property. This can be done by so construing these charter provisions as to limit the actual assessment to be made by council to one-third of the value of the lot after the improvement, and to make the failure on the part of the owner to object, operate as a waiver of the estimated assessment, provided it does not exceed the one-third valuation. Inequality of estimation among lot owners, and other equally meritorious objections, though the valuation was within the limit of the charter provisions relative to the actual assessment by council, might be made by any owner. And failure to object to these matters might operate as a waiver of ultimate objection to the actual assessment. But I am convinced that council can not be permitted to violate the charter provision limiting it, in case of assessment for the improvement of a street, to one-third of the actual value of the property after the improvement, within any five year period, and base such violation on the failure of the owner to object to the estimated assessment fixed by the chief engineer.

Accordingly I am of the opinion that under these charter provisions council may not levy an assessment in excess of \$309.45, the estimated amount, which excess in this case was \$56.97. And the only remaining question is, whether the court should further reduce this assessment, because the court finds from the evidence that the prior assessment for Kenworth road, \$402.72, added to the actual assessment for Orchard Lane, \$366.42, in all \$769.14, exceeds by \$185.81 one-third of \$1,750.00, the court's estimate of the value of plaintiff's lot after the improvement were made.

I am clearly of the opinion that the court ought not to disturb such assessments merely because the court's estimate differs presumably from the estimate of council as to the value of the lot after the improvement. In order to make the assessment on this lot valid, the council must have concluded that the lot was worth, after the improvement, at least \$2,207.42. An examination of defendant's evidence will show that an average of the

estimate of defendant's witness makes the property worth substantially \$2,300.00, after the improvement. I am satisfied that this amount is too much, in view of all the circumstances. I think if an unbiased appraisal could be gotten, the amount would not exceed the amount found by the court, \$1,750.00. While the court will not weigh with diamond scales the presumed estimate made by council, I am inclined to the opinion, judging from the whole case, that any such estimate made by council was far in excess of the real value of the lot. I think the court has been liberal to defendants in its valuation of the lot, after the improvement, at \$1,750.00 and that the assessment ought not to have been made on an estimate above that valuation under any circumstances. Finding that the assessment levied by council is \$185.81 in excess of the amount that could in any event have been assessed, this amount should be deducted from the \$366.12, leaving the amount chargeable against the plaintiff's property for the improvement of Orchard Lane at \$180.61; and all amounts for such improvement above the latter amount should be enjoined. Let a finding and decree according to the foregoing be made.

Exceptions. Costs charged against defendants. Appeal if desired and bond fixed.

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**BONDS DEPOSITED BY FOREIGN INSURANCE COMPANIES
NOT TAXABLE IN OHIO.**

Common Pleas Court of Franklin County.

**THE CANADA LIFE ASSURANCE COMPANY V. VALENTINE, AUDITOR,
ET AL.***

Decided, January 3, 1921.

*Taxation—Situs of Bonds for Purposes of Taxation—Where Deposited
in Ohio by Foreign Insurance Companies in Conformity to Stat-
utory Requirement.*

Section 5437, exempting foreign insurance companies from payment of taxes on bonds deposited with the superintendent of insurance for the protection of Ohio policy holders, is a constitutional enactment, and foreign companies making such deposits are relieved from listing such bonds for taxation.

ROGERS, J.

The action is one to enjoin the auditor and treasurer, respectively, of this county from levying and collecting taxes on municipal bonds deposited by the plaintiff with the superintendent of insurance of the state. The case is heard and submitted, in the main, upon the pleadings.

The facts are, in substance, these: the plaintiff is a foreign life insurance corporation, having its organization and domicile in the Dominion of Canada. However, it has complied with the laws of Ohio permitting it to transact its business in this state, and is and was so engaged in the life insurance business at the times hereinafter mentioned. Pursuant to Section 9373, General Code, which requires every foreign life insurance company, before it may transact its business in this state, to deposit with the superintendent of insurance, for the benefit of its policy holders, securities to the amount of one hundred thousand dollars, plaintiff on March 18th, 1915, deposited one hundred thousand dollars per value of the municipal bonds of the city of Cleveland, Ohio, issued March 1st, 1914, with said superintendent. On March

* On May 12, 1921, the Court of Appeals entered a like decree of injunction in this case on appeal.

12th, 1919, neither plaintiff nor the superintendent having returned these bonds for taxation, the auditor notified plaintiff of his intention to list such bonds, and of the date, to-wit, March 25th, 1919, fixed for the determination of the matter, thereby giving plaintiff an opportunity to be heard. On April 10th, 1919, the auditor, after the aforesaid notice and hearing entered said bonds on the tax list for the years 1915, 1916, 1917 and 1918 for taxation, during which years said bonds remained on deposit with said superintendent for the purpose aforesaid. The aggregate of the taxes so assessed at the respective rates and valuations for the years mentioned amounts to \$5,950, which amount has been certified to the treasurer for collection, and he threatens to make collection thereof of the plaintiff.

Plaintiff contends that the auditor and treasurer respectively are not authorized or empowered, under the statutes of Ohio, to levy or collect taxes upon these bonds; and that they are not subject to the taxation attempted to be levied or collected as against them, or to hold plaintiff liable therefor. The main question, therefore, is: are the bonds in question subject to the attempted taxation under the statutes of Ohio, as they existed at and during the years covered by the levy and threatened collection of the alleged taxes. It seems to be conceded that, prior to the amendment of the statutes in 1902 (95 O. L., 290, Section 2745 R. S.,; Section 5437 G. C.) such bonds were held to be taxable in this county. See *Insurance Co. v. Bowland*, 196 U. S., 611; *Western Association Co. v. Halliday*, 110, Fed., 259; 127 Fed., 830; 126 Fed., 257. However, since that date, as contended by plaintiffs counsel, it claims immunity from taxation on all bonds so deposited, pursuant to statute, with the superintendent of insurance. The statute which it is claimed relieves the plaintiff from taxation of such bonds is found in the chapter of the General Code governing foreign insurance companies relative to taxation, and reads as follows:

“Section 5437. Neither insurance companies and associations, incorporated by the authority of another state or government, nor the superintendent of insurance, shall be required to make return for taxation of the deposits of such companies or associa-

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tions made as required by law, with the superintendent of insurance, for the benefit and security of bond holders; nor be governed with respect to such deposits by the provisions of law relating to the listing of personal property or to the making of tax returns by corporations.”

It is clear that this section relieves plaintiff from making a return of these bonds for taxation. The statute in effect makes these bonds, while so deposited, non-taxable as bonds in Ohio. This being so, unless the statute violates some constitutional provision the bonds are not taxable. On the other hand, following the decisions above mentioned, cases construing substantially the same statutes relative to taxation as are for construction in the instant case, the bonds are taxable, if the above quoted section is unconstitutional. The case, therefore, resolves itself into the ultimate question as to whether Section 5437 General Code is or is not constitutional.

It is fundamental that the section is presumed to be constitutional, and, if any reasonable doubt exists as to whether or not the section is irreconcilably in conflict with the Constitution, such doubt is to be resolved in favor of its validity. Such has been the substance of the decisions in Ohio from the case of *Lewis, Trustee, v. McElvain*, 16 Ohio, 347, down to and including *Railroad Co. v. Commissioners*, 1 O. S., 77; *State ex rel v. Jones*, 51 O. S., 492; *State ex rel v. Price*, 101, O. S. ——. The constitutional provision which it is claimed Section 5437 G. C. violates is Section 2 of Article 12 which declares:

“Laws shall be passed, taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money, excepting,” etc.
true value in money, excepting,” etc.

The exceptions are of no consequence in this case. According to the construction of our federal courts as declared by the decisions above mentioned, the General Assembly had passed laws, prior to the passage of Section 5437, authorizing the taxation of the securities deposited with the superintendent; and these

laws are still in force substantially as they existed at the time of those decisions, with, however, Section 5437 added as a part of the scheme of taxation of foreign insurance companies. If, therefore, this section when added to the general scheme of taxation of such foreign corporations is irreconcilably in conflict with the above constitutional provision, the section must be condemned as unconstitutional.

The "securities" which Section 5437 declares not to be subject to taxation in Ohio, are the securities, stocks and bonds which are required by law to be deposited with the superintendent by Section 9373 G. C., and Section 9565 G. C., respectively, to entitle foreign insurance companies to transact business in this state.

Securities such as are mentioned in the statutes above named are what are known in the law as intangible property. Independently of statute on the subject the rule with reference to the place for the purpose of taxation of such property differs from the rule relative to the place for the taxation of tangible personal property. In *Worthington v. Sebastian*, 25 O. S., 1, White, J., at page 8 in the opinion expresses this difference so clearly that I quote the language:

"Our system of *ad valorem* taxation has uniformly proceeded on the theory, that tangible property is to be taxed according to the law of the place where it is situated, irrespective of residence of the owner; with equal uniformity, it has proceeded upon the theory that credits, investments in bonds, stocks, etc., are taxable according to the laws of the place where their owners or holders reside."

According to the general trend of the decisions it appears to be the rule adopted by the state and federal courts that the situs of intangible property for the purposes of taxation is fixed at the domicile of the owners or holders in the absence of a statute fixing a different situs. Bonds are of a mobile character, and for the purposes of taxation, in the absence of a statute separating them from the owner, they follow the owner or holder. See on this general subject: *Grundy v. Tenn. Coal Co.*, 94 Tenn., 295; *New Albany v. Meeker*, 56 Am. Dec., 523, note at 527; *Matter*

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of *Bronson*, 150 N. Y., 1; *Hall v. Fayetteville*, 115 N. C., 281; *Beck v. Miller*, 62 Am. St., 436, note at 452.

The author in 37 Cyc., 801, lays down the general rule relative to the taxation of intangible personal property to be that a state can not tax credits, investments and securities belonging to a non-resident, although the evidence of debt may be within the state, and cites several cases in support of the text.

While the place for taxation of such bonds, in the absence of a statute, is the domicile of the owner, it is equally true that investments in bonds may be separated from the person of the owner, by statute, and given a situs of their own. It was so held as to shares of stock. *Tappan v. Merchants Bank*, 19 Wal., 490; and bonds, as it appears to me, stand on no different footing in this respect. But, when not so separated, their situs follows and adheres to the domicile of the owner. See *Bradley v. Bander*, 36 O. S., 29, 35, and cases there cited.

Again, while Section 2 of Article 11 of the Constitution provides that laws shall be passed taxing by a uniform rule investments in bonds, etc., it is not contemplated that the General Assembly shall enact laws taxing every bond brought into, or deposited in this state, no matter for what purpose. Nor does the constitution pretend to fix the situs of any investment in bonds, etc. for the taxation of which laws are required to be passed. It merely names the subjects of taxation and makes no limitation as to their situs or ownership. See *Worthington v. Sebastian*, *supra*, at page 8. The Constitution leaves the matter of fixing the situs, so far as not fixed by the common law, to legislative enactment.

Moreover, in cases of taxing intangible personal property, the domicile or residence of the owner may become a material factor. If the owner resides within the state, such intangibles, speaking generally, are taxable here in all events. Not necessarily so however, as to intangibles physically within the state, when the owner resides beyond its boundaries. Such property may be taxed here under certain limitations, or may not be so taxed, as the Legislature may declare. But it can not be said that the Legislature *must provide* for its taxation here merely because the se-

curity—the evidence of the debt—is physically within the state. Accordingly, prior to the enactment of Section 5437 G. C., the General Assembly exercised its discretion under the Constitution to treat the securities that had been deposited for the benefit of the policy holders and had no fixed place for purposes of taxation as taxable in this state, and declared them taxable in Ohio. However, by the enactment of 5437 G. C., the General Assembly again exercised its discretion under the Constitution to treat the securities that had been deposited for the benefit of the policy holders and had no fixed place for purpose of taxation as non-taxable in this state. Hence, if it lies in the discretion of the Legislature to tax such securities in this state, and it is not compulsory so to do, I see no constitutional reason why such legislative enactment may not be changed so as in effect to exclude the situs of such property for the purposes of taxation from Ohio altogether. And in my opinion such a change was made by the passage of Section 5437, General Code. The General Assembly by this enactment declared in effect that these bonds having been deposited with the superintendent of insurance for purposes named in the act, should have no situs in Ohio for the purposes of taxation. Such enactment is merely declaratory of the policy of the state to treat the situs of such bonds as following the owner and not to fix such situs at the place of their actual deposit. It must be kept in mind that in the absence of statute fixing a place where this intangible property was to be taxed, the general law fixed the place at the domicile of its owner or holder, and it is only by the statute fixing a place in Ohio for the taxation of such bonds that they could be taxed at all in this state; for, under the common law, their mere physical presence here was not sufficient of itself to furnish the right to tax them here.

Taking the foregoing view of Section 5437, General Code, it appears to be reconcilable with the provisions of the Constitution mentioned which does not fix the situs of such intangible property, but leaves that to be fixed either by the general law or by statute. And the statute having declared its policy not to tax securities so deposited with the superintendent, and to

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treat them as non-taxable in the state, I see no conflict between the legislative enactment and the Constitution in this regard.

Of course, if the Constitution when it declared that the Legislature should pass laws taxing investments in bonds, etc., fixed the situs of all bonds which are actually within the bounds of the state as taxable here, we would have a different case. But on the contrary the Constitution does not fix the place where any intangible or other property shall be taxed or what intangible property shall be taxed. It leaves that entirely to the Legislature for the latter to exercise its discretion with reference to the place of taxation of all such intangible property.

It is further contended that the legislative declaration not to tax these bonds in Ohio violates the uniform rule of taxation. I do not think so. The rule is uniform as to non-taxability of all such bonds of foreign insurance companies. The law may provide for the taxation of like bonds of domestic companies. This is right, because such companies reside in Ohio, and own bonds whose situs is fixed by such residence and ownership. These two elements furnishing the foundation for taxation of intangible property in the case of domestic corporations co-exist. Not so, however, with reference to the foreign corporations mentioned. Their status is different, and the General Assembly may, therefore, make one rule for them as to their intangible property which may or may not be taxed in Ohio, so long as it is uniform, and another rule for domestic corporations whose intangible property in Ohio must be taxed therein.

Arriving at the conclusion that Section 5437, General Code, is reconcilable with the Constitution, the finding of the court is in favor of the plaintiff and against the defendant, and a decree of injunction is ordered according to the prayer of the petition.

**RIGHTS OF CONTRACTOR WHERE CERTIFICATE OF ARCHITECT
HAS BEEN REFUSED FOR FULL AMOUNT.**

Common Pleas Court of Cuyahoga County.

THE REAUGH CONSTRUCTION CO. v. AMANDA L. CORLETT.*

Decided, April 14, 1920.

Building Contracts—Delays in Completion of Work—Contractor Claims Architect Acted Unfairly in Making Deductions—Question of Damage from Delay One For the Jury—Where Architect is not Made the Final Judge Contractor may Recover Without Architect's Certificate.

A contractor agrees to complete, to the satisfaction of the architect, the reinforced concrete frame of a building within sixty-two working days or pay \$50 per day for every day the work remains uncompleted thereafter. At the conclusion of the specified time the work is substantially completed, and, on entire completion, the architect gives his certificate for the entire balance due deducting, however, at the rate of \$50 per day for three periods of delay to other contractors, caused, as he claims, by the work of the contractor in making certain alterations and corrections. The contractor refuses the certificate and sues for the entire balance due, claiming that no delays ensued for which he was responsible, and that the architect had unreasonably, willfully and capriciously made such deductions and withheld his certificate for the full amount. The owner took issue and filed a cross-petition for the entire period of delay at \$50 per day. *Held:*

1. There being no proof of actual damage to the owner by reason of the failure of the contractor to perform strictly, the latter was entitled to recover, if at all, on his petition, the entire balance due with interest.
2. The contract providing that the work shall be completed to the satisfaction of the architect, and that final payment should be made only on production of his certificate that the work has been so completed, and containing no stipulation that the architect shall be the final judge or that his judgment should be final or conclusive, the contractor may recover the entire balance due him

*Affirmed by the Court of Appeals February 26, 1921; motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court June 2, 1921.

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without the architect's certificate of satisfaction on a showing that in withholding or refusing such certificate, the architect acted arbitrarily, capriciously or unreasonably. (*Ashley v. Henahan*, 56 O. S., 559, 570 and *Wicker v. Messinger*, 22 C. C., 712 followed, and *Fred R. Jones Co. v. Fath et al*, 101 O. S., 142 distinguished.)

3. Whether the architect acted arbitrarily, capriciously or unreasonably in withholding or refusing a certificate for the full amount claimed by the contractor is an issue to be tried and determined by a jury.

Boyd, Cannon, Brooks & Wickham, for plaintiffs.

Holding, Masten, Duncan & Leckie, for defendant.

KRAMEF, J.

It is contended by counsel for defendants herein, in support of the defendant's motion for a new trial:

First. That the jury erred in returning a verdict for plaintiff for the full contract price, when, at the most, substantial performance of the contract only, has been proved.

The claim that the evidence does not show strict performance is doubtlessly well taken. Certain minor variations, at least, from the plans and specifications, appear in the work, from which it must be said that the jury could have found substantial performance only. The fact that the architect tendered a certificate which made no deductions for these defects, would not, of course, foreclose defendant from pressing them upon the trial, that certificate having been rejected.

The record, however, shows no evidence of damage accruing to the defendant from plaintiff's failure to perform strictly. Under these circumstances, the court instructed the jury:

"There being no evidence in this case, gentlemen, to show any damage to the owner, by reason of the failure, if any there was, to build the building in strict compliance with the plans and specifications, the plaintiff is entitled to recover, if entitled to recover at all, upon his petition, the balance therein claimed, with interest from the date concerning which you have been heretofore instructed, namely, August 13, 1914, which is thirty days after the last work was done on the premises."

The finding of the jury upon the plaintiff's petition, in this regard, was in accordance with this instruction, and, in the opin-

ion of the court, there is no reason presented for disturbing the verdict, in this regard.

Second: That the verdict is not sustained by sufficient evidence, and is against the weight of the evidence.

The controversy in this case, as it appeared to be presented at the trial, was in respect to certain deductions made by the architect, under that clause of the contract which provides (Art. 6):

“The contractor shall complete the several portions, and the whole of the work comprehended in this agreement, by and at the time or times hereinafter stated, with the exception of the one-story portion, 100' 0" north from the Euclid avenue building lines. The party of the first part agrees to complete the reinforced concrete and structural steel work herein described, within sixty-two working days after possession can be obtained of that portion occupying 102' 3-4 of the Euclid avenue frontage by the depth to the extent of 100' 0", and to pay to the party of the second part the sum of \$50 per day for each and every day the work remains unfinished, after the expiration of the time above specified. The party of the second part agrees to pay to the party of the first part the sum of \$25 per day for every day the work is completed before that date. The portion north of 100 feet from Euclid avenue is to be completed without delay after possession is obtained.”

The deductions were for the number of days, at \$50 per day, during which the architect claimed the building had been delayed by defective work of plaintiff, after the expiration of the time allowed in the contract for the plaintiff to complete its work.

The contention of the plaintiff is that the work was not defective in the respects claimed, and that, if there were any defect, there was no delay to the construction of the building by reason thereof.

The work of the plaintiff, by the provisions of the contract and specifications, was to be done to the satisfaction of the architect, and payments were to be made only upon his certificate. No certificate for the amount claimed by the plaintiff and found due it by the jury having been issued, the plaintiff pleads that the architect “wrongfully, arbitrarily, capriciously and unreasonably and at defendant’s request, refused * * * to issue a proper certificate.”

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At the request of the defendant, the court charged (No. 4) that there was no evidence to support the allegation that the certificate was withheld at the request of the owner, the defendant. The question then, is, whether the evidence supports the verdict that the certificate was arbitrarily, capriciously and unreasonably withheld?

The deductions made by the architect were for delay caused, as he claims, in the setting of the terra cotta, due to the concrete walls erected by the plaintiff being out of plumb; delay caused to the plasterer by reason of the faulty construction of the floors and ceilings, and delay caused to the mason contractor in finishing the floors, due to their faulty construction, all of which delays the architect claims controlled the progress of the building.

The plaintiff, on the other hand, alleges that the difficulty in the setting of the terra cotta was caused by the fault of the mason contractor in starting his work inside the building line, and that this was known to the architect, and admitted by him to be the fact; that the plasterer was not delayed in the prosecution of his work, due to any faulty work of the plaintiff, and not at all during part of the time for which the deduction was made; that the controversy in relation to the finishing of the floors was due to the type of construction, which caused the heads of the pillars to project into the floors and not to any default of the plaintiff.

The record will show that competent evidence was offered upon both sides, to substantiate the claims made by each side, respectively. The court can not attempt, here, to review the evidence. There appears to be nothing in the testimony of the various witnesses, to require special comment, excepting this, that the evidence of the architect, is surprisingly indefinite, in substantiation of his deductions. In the instance of the plasterer, Mr. Taylor, himself, testifies that he started his work, and was not delayed thereafter, upon May 28th, while the architect deducts to June 16th. For his second deduction, for the second period of delay, caused by the interference of the terra cotta, charging the full amount to the plaintiff, he seems to offer practically no explanation.

There would seem to be no ground for the court to say that

the jury could not reasonably find that the facts were as plaintiff claimed them to be.

If it is the law, that it is for the jury to say, whether the certificate was arbitrarily, capriciously or unreasonably withheld, it would seem to the court that a finding that this certificate was so withheld, upon the facts, as alleged by the plaintiff, could not be negatived by the court.

Third: That the verdict is contrary to law.

The question as to the correctness of the law, as laid down by the court, is again raised in the supplemental brief of defendant; and in oral argument, and in briefs, in which both sides have exhaustively presented the question to the court.

The court has examined the authorities presented by both sides, and while it is not convinced that the interpretation of the law, as made by it at the trial, is not correct, the question is certainly not free from doubt.

The plaintiff herein, not having the certificate of the architect, as provided in the contract, excuses the production of the certificate, by pleading that it is arbitrarily, capriciously, and unreasonably withheld, and the court held and charged the jury, that if they found that the certificate was so withheld, the plaintiff might recover in this action.

It is the contention of the defendant that, in order for the plaintiff herein to recover, it is not sufficient for it to show that the architect's certificate was arbitrarily, capriciously or unreasonably withheld, but that it must show fraud, or palpable mistake, upon his part, in so withholding the certificate.

The plaintiff, at all times, during the trial, negatived any claim of fraud, so that, if the defendant is correct in his contention, there will be not only error of law in the case, but it would necessarily be found that the facts did not permit the plaintiff to recover.

The court has been cited certain authorities in which the contract contained the provision that the decision of the architect or engineer should be "final", or "conclusive," or "final and conclusive." The law appears to be well settled, and sustained by all of the authorities, apparently without exception, that in

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such case, the plaintiff can not recover, without the certificate of the architect or engineer, without showing that the certificate is withheld through fraud or manifest or gross mistake.

The law in this regard is stated in 9 Corpus Juris, page 772, Section 115:

“The decision, estimate or certificate of an architect, engineer or superintendent, in proving or disapproving the work as a performance of a contract, or in passing on questions relating thereto, is, in the absence of fraud, bad faith, or mistake, conclusive and binding on the parties, where the contract, either in express terms, provides that it shall be final and conclusive, or in plain language, shows that it was the intention of the parties that the person to whom the question is submitted should be the final arbiter thereof.”

In *Munday v. R. R.*, 67 Fed., 633, the contract, itself, provides that the decision of the engineer shall be conclusive, in the absence of fraud or mistake. The following cases, also cited by defendant, fall within this class: *Trust Co. v. Iron Works*, 166 Fed., 399; *Elliott v. Ry.*, 74 Fed., 707; *R. R. Co. v. March*, 114 U. S., 553; *Bridge Co. v. County*, 226 Fed., 728; *B. & O. R. R. Co. v. Stankard*, 56 O. S., 224, at 232.

To these cases might be added the case of *Fred R. Jones Co. v. Fath et al*, 101 O. S., 142), decided in January, of this year, by our Supreme Court, in which it is held:

“Where parties to a building or construction contract agree to abide by the decision of an engineer or architect, having oversight or supervision of such work, as to the amount, quality, acceptability and fitness of the several kinds of work which are to be done and paid for under such contract, the decision of the arbiter so designated is binding upon the parties, unless it be shown by clear and convincing evidence that such decision was based upon fraud, dishonesty or collusion.”

The distinction between this class of cases and those in which no such clause appears, is made in Corpus Juris which follows the quotation above, with the statement (p. 774):

“Where the contract is to be performed to the satisfaction of the architect or engineer, who is to issue a certificate of ap-

proval, the refusal of the architect or engineer to approve the work is, unless he acts unreasonably, arbitrarily or fraudlently, binding on the contractor.”

Inasmuch as there is no claim herein that there is any such provision in the contract here in question, applicable to the clause under which the achitect made his deduction, this class of cases should be differentiated out of the discussion of the law applicable to the case at bar.

When the contract is of the kind with which we are here concerned, the authorities appear to be in decided conflict. The case of *Bank v. Bridge Co.*, 183 Fed., 391, decided by the United States Court of Appeals for the Sixth District (Ohio), squarely sustains the position of the defendant. That case holds (quoting from the syllabus):

“When a building contract requires the contractor to obtain the architect’s acceptance of the building, as a condition precedent to his right to final payment therefor, he can not maintain an action to recover such payment without certificate, in the absence of fraud on the part of the architect, or of mistake so gross as to imply bad faith. It is not sufficient to show that it was withheld unreasonably and unfairly.”

The court appears to recognize a difference between the state and federal rule, when it says (p. 394):

“In our opinion, the trial judge erred in holding that the architect’s certificate could be dispensed with, if the jury were satisfied that it was ‘unreasonably and unfairly’ withheld. It is true that this instruction finds support in several decisions of the state court, cited in plaintiff’s brief.

To the same effect as *Bank v. Bridge Co.*, are *Bryce v. Fidelity Co.*, 111 Fed., 142; *Hudson v. McCartney*, 33 Wis., 342; *Lynn v. Maryland*, 60 Md., 415.

Upon the other side, we find it held, in *Scully v. U. S.*, 197 Fed., 327 (syllabus 2):

“While the decision of an arbiter to whom the question of the performance of a contract is committed by its terms, is binding on the parties in the absence of fraud, mistake or negligence so

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great as to be equivalent to bad faith, it is not necessary that there should be actual fraud or intentional wrong, to entitle the contractor to maintain an action to recover for his work, notwithstanding the refusal of the arbiter to approve the same, but it is enough if such refusal was arbitrarily, unreasonable, or unjust."

Again, in *Elizabeth v. Fitzgerald*, 114 Fed., 547, quoting from the syllabus, it is said:

"The question whether a contractor * * * had performed the work in substantial compliance with the contract, and whether the refusal of the city's officers to certify that it had been so done, and to approve the same, was unreasonable, are questions of fact, and, where material, and the evidence is conflicting, are proper questions for submission to the jury."

Grain Elevator Co. v. Clark, 80 Fed., 705; *Bird v. St. John's Episcopal Church*, 154 Ind., 138; *Pittsburg Lumber Co. v. Sharp*, 190 Pa., 256; *Thomas v. Stewart*, 132 N. Y., 580, are generally to the same effect.

With the authorities so conflicting, any utterance of our state courts must be given considerable weight. In *Ashley v. Henahan*, 56 O. S., 559, the plaintiff did not have the certificate of the architect, and made no claim that the certificate was, for any reason, refused. The holding of the court was, that upon such state of facts, the plaintiff could not recover. By way of *obiter dictum*, the court, at page 570, says:

"Had the plaintiff shown that he had made application to the architect for the requisite certificate, and that he had obstinately and unreasonably refused to certify, he might then have established his case by other evidence."

And, on the same page:

"He (the contractor) might, however, as suggested above, on an averment, supported by evidence, that the architect had fraudulently or unreasonably refused his certificate, recover by showing a substantial performance of the work, as required by the contract, but in the absence of such a showing against the architect, a recovery can not be had without his certificate."

In *Wicker v. Messinger*, 22 C. C., 712, the court in construing *Ashley v. Hanahan*, at page 721, says:

“ * * * that, although the finding is that the ground the architects stood upon was, that they were not satisfied with the work, and that was their reason for withholding the certificates, yet, that is consistent with the determination, upon the part of the jury, that this view, which the architects entertained, was not justified by the facts, and that the refusal to give a certificate was unreasonable; and, as is said by the Supreme Court, in *Ashley v. Hanahan*, *supra*, if the architect was unreasonable in refusing his certificate, the plaintiff may recover by showing a substantial performance of the work, as required by the contract.”

It appears to the court that these statements of the law by the Supreme Court, and one of the circuit courts of this state, indicate that Ohio will follow the law as laid down by that line of authorities, which hold that, if the certificate of the architect is capriciously, arbitrarily or unreasonably withheld, the contractor may recover, and that whether the certificate is so withheld, when such allegation is supported by competent evidence, is a question for the jury.

The court is, therefore, of the opinion that the motion of the defendant for a new trial should be overruled. To which ruling the exception of the defendant is noted.

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**UNAUTHORIZED DELEGATION OF POWER BY THE STATE
CIVIL SERVICE COMMISSION.**

Common Pleas Court of Wayne County.

BERTON E. CARMICHAEL V. CHARLES E. THORNE.

Decided, December 30, 1920.

*Civil Service—Department Chief Appointed by Delegated Authority—
Invalidity of Such Transfer of Authority—Mandatory Injunction
Against the Commission.*

When under the civil service law a vacancy has occurred in the classified service where peculiar and exceptional qualifications of a scientific, managerial, professional or educational character are required, and the commission finds that for special reasons competition is impracticable and the position can best be filled by the selection of some distinguished person of high and recognized attainments in the line involved, the commission is without power to delegate authority to make such appointment, but must themselves perform the duty of making a suitable selection.

Critchfield, J.

On October 8, 1920, the plaintiff, Bertin E. Carmichael, filed his petition against the defendant, Charles E. Thorne, and sets out in rather great detail, various facts, alleging that the defendant is the duly appointed and acting director of the Ohio Agricultural Experiment Station, and has the appointing of the chiefs of departments, assistants and other employees, with the approval of the board of control of said station, and that the chiefs of said departments, including the plaintiff, are in the classified service under the civil service laws of the state of Ohio. That for the last fifteen years, the plaintiff has held the position of chief of the Department of Animal Husbandry.

The plaintiff further says that on or about March 1, 1918, defendant unlawfully, wrongfully and unjustly entered upon a scheme to deprive plaintiff of his said office and drive him from said station, and to disgrace and discredit him in the agricultural world, so as to make it impossible for him to obtain any employment of like character, or employment of any kind, in any other experiment station in the United States.

The plaintiff then charges the defendant with having entered into a cheme to abolish the department of Animal Husbandry, over which the plaintiff was chief, and by that fact deprive the plaintiff of any office at said station.. That he entered into said scheme and procured the Board of Control to pass a resolution abolishing said department. of Animal Husbandry and another department, the department of Nutrition, and combine the work of the two departments into one known as the department of Animal Industry. Then he recites the filing of the suit by the plaintiff in which a temporary injunction was obtained in this court, restraining said defendant and the board of control from proceeding to combine said departments, which said suit was finally terminated on the first day of August, 1920, by virtue of an agreement entered into in July of 1919.

The plaintiff says that on the first day of August, 1920, said department of Animal Husbandry was in the classified, competitive Civil Service of the state of Ohio, and that by virtue of said civil service law as found in Section 486 in Volume 106, page 406 and in the various subdivisions of 486, he, the plaintiff, was entitled to be certified as one of three eligibles for appointment as chief of the new department, but that the defendant and said civil service commission did not ask for certification from the civil service board of said three eligibles, but proceeded to order the plaintiff to vacate his office and remove from said station, and proceeded to arbitrarily appoint one E. B. Forbes as the chief of said new department, the plaintiff claiming that he having occupied a similar position in one of the abolished departments, was eligible for appointment to said new department, and that under the law, his name should have been certified to Director Thorne for said appointment. He says that all acts of the defendant were gross frauds upon his rights and he asks that a temporary injunction be granted, which was granted at the time, and upon final hearing that a permanent injunction be granted, and that a mandatory order issue to the defendant requiring him to request said civil service commission to certify eligible candidates for said position as chief of said new department of Animal Industry.

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This petition largely consists of a recitation of historical matter, with the addition of new acts of Director Thorne since October 1, 1920, by which the plaintiff was not certified by said civil service commission to Director Thorne for appointment to said position, and that this was done fraudulently and against the rights of the plaintiff.

Now the defendant, Charles E. Thorne, through the attorney general's office, files an answer in which he admits various allegations of formal matters. Admits that the consolidation of said two departments was made as claimed; admits that said plaintiff was ordered to vacate said office and vacate the residence on said farm; admits said law suit which terminated on August 1, 1920, and says that by reason of said settlement in said law suit, said Carmichael automatically was relieved from all duty and all rights at said station.

He further says that after the beginning of this said suit, said new department of Animal Husbandry was placed in the unclassified civil service list by the said civil service commission, which removed said position from competitive examination, and he admits that he, with the consent of the board of control appointed one E. B. Forbes to said position as chief of said new department, but he says he did the same temporarily by virtue of one of the sections of said law, to wit, Section 486-14, and he denies all frauds and all schemes and all the allegations of the petition which reflect upon the bona fideness of said transaction. He further says that after said new department was placed in said unclassified list, he did not request the said Civil Service Commission to certify the names of eligibles to said appointment as the same would be "a vain thing, as said positions were no longer under the civil service laws and regulations."

Now from the pleadings in the case and the evidence and the briefs filed in the claims of both plaintiff and defendant, the court finds that the plaintiff denies the right of Director Thorne, who has the appointing power for all positions in said agricultural experiment station, which said appointments are subject to ratification or rejection by the Board of Control, to appoint said E. B. Forbes to the position of Chief of Animal Industry,

and denies the right of the said Civil Service Commission to allow said Thorne the appointing power or the power to name the individual who shall occupy said position.

Plaintiff claims that under the civil service law as found in Section 486 in the Revised Statutes and as amended in said volume 106 Ohio State Laws page 400, that the said Civil Service Commission was bound to name or send the names of one or more eligibles to said position, and that Director Thorne could then choose from that list of eligibles the person who was to become the chief of the new department of Animal Industry.

The defendant denies this, and says that all provisions of the Civil Service law, statutes and constitution of the state on the subject have been complied with in regular form.

The question narrows down to one point, and I have been unable to find any case in which this has been passed upon by any court. The Civil Service law has been reviewed by numerous courts, and our own Supreme Court at different times, but the one question involved in this case so far as I have been able to ascertain, has not been passed upon.

The provisions of the constitution of Ohio, Section 10, Article 15, says in substance, that *all* appointments and promotions in the Civil Service shall be made according to merit and fitness, which shall be determined by competitive examination, when the same is practicable. In the 90th O. S. on page 258, the case of *Green v. Commissioners*, the Supreme Court has passed upon the constitutionality of the statute in question, and of that rule and regulation of the Civil Service Commission in pursuance of said statute, and held the same to be constitutional, that is, they have held that the Civil Service Commission could adopt rules and regulations to carry into effect the provisions of said statute, and that the divisions of all persons into the classified and unclassified lists was legal, and that the statute in question 4861-31 or those sections under controversy in that suit were legal, and especially passed upon 486-7 first and 486-14 especially paragraph 2, which paragraph 2 is involved in the discussion of the case at bar. This section reads as follows:

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“In case of a vacancy in a position in the classified service where peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character are required, and upon satisfactory evidence that for special reasons competition in such special case is impracticable and that the position can best be filled by a selection of some designated person of high and recognized attainments in such qualities, the commission may suspend the provisions of the statute requiring competition in such case, but no suspension shall be general in its application to such place, and all such cases of suspension shall be reported in the annual report of the commission with the reasons for the same.”

It seems to be admitted that there is no other defect in this case in the filling of the position of chief of Animal Industry, except the claim of the plaintiff that the State Civil Service Commission had not the power to delegate to the appointing power, in this case Director Thorne, the naming of the person for the position, a person of high and recognized attainments.

Said Civil Service Commission has been proceeding on the theory of all appointments to be made by them in the unclassified list as established by them (and it now appears to the court that this position is in the unclassified list), of allowing the appointing power to fill the vacancy, to name the man, without any action on the part of the Civil Service Commission; that the selection of some designated person of high and recognized attainments in the qualities necessary for said position, was left to the discretion of the appointing power; while the plaintiff claims that that power exists in the said Civil Service Commission and can not be delegated.

I have tried to make myself clear on the issue in this case, and I have just stated it as near as I can. In the case at bar, after the said Civil Service Commission had placed the position of chief of the Department of Animal Industry in the unclassified list, and notified Director Thorne at the Station of that fact, they performed no other act. Prof. Thorne, the appointing power, proceeded to fill that position according to his own best judgment. This right of Director Thorne to so act, is disputed by the plaintiff. The action of the Civil Service Commission in

turning this appointing power over to Director Thorne is disputed by the plaintiff, and it is denied that the State Civil Service Commission, notwithstanding having placed this office in the unclassified list and therefore not subject to competitive examination, had performed their full duty and have nothing further to do.

This question has never been directly passed upon by any court, whose decision I can find.

Does the mere fact that the State Civil Service Commission having exercise their judgment and discretion and having found this office to be such a one as it is not practicable to fill by competitive examination and placing the same in the unclassified list, relieve them of all further duty in the matter? I am unable to bring myself to that view. I believe that the State Civil Service Commission has a further duty to perform as found in the statutes, and under their own rules and regulations. While it is true that said paragraph 2 of Section 486-14 speaks of a position in the classified list, and of temporary and exceptional appointments, yet Director Thorne has proceeded under said section to fill said vacancy temporarily, and I may say in passing that the temporary injunction granted on the 8th day of October is still in force, and no other appointment has been made, but it is claimed that Director Thorne has the power to fill the vacancy as I have indicated, without any act on the part of the Civil Service Commission, beyond that which they have performed, that is, placing said office in the unclassified list; and it is claimed in the answer of the defendant in this case as follows: "After said orders of said commission the request for the certification of the names of eligibles would be a vain thing, as said positions were no longer under the civil service laws and regulations."

The orders of the commission above referred to was the order transferring the position of chief of animal industry and various other scientific positions, into the unclassified list, but the defendant claims in his answer that that act of the State Civil Service Commission removed this position from any act of the Civil Service laws, and that said position was not under the Civil

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Service laws as above quoted, which, in effect, claims that any one in the unclassified list ceases to be under the Civil Service laws, and yet the constitution provides that "all appointments and promotions in Civil Service shall be according to merit and fitness" and that all appointments means all appointments under the state, such as chief of animal industry. The claim of the defendant simply wipes out the constitutional provisions that all employees, agents and officers of the state shall be selected and promoted according to merit and fitness, and this claim is founded upon one act of the State Civil Service Commission, that they have placed this office in the unclassified list. A deliberate nullification of the constitutional and statutory provisions governing the Civil Service of the state of Ohio.

I do not believe the State Civil Service Commission can delegate to the appointing power in the unclassified list the selection of some person of high and recognized attainments, even though they have decided that that person need not undergo a competitive examination. It is a plain case of delegating their authority to the appointing power instead of exercising said authority themselves, either by competitive examination, in a proper case where it is practicable, or selecting a person of high and recognized attainments, where it is not practicable. They performed their duties under the first class in certifying eligibles under the competitive examination, and why should it not be their duty to select the eligibles under the second classification, or the unclassified list?

I hope I have made myself clear in the presentation of this matter. The issue is simple in the case, and there is but one issue and that is this: must the Civil Service Commission act in selecting an eligible to fill a position, even though he was in the unclassified list, or can they delegate that to the appointing power?

I think the duty is incumbent upon the State Civil Service Commission to perform that duty, and they can not delegate that, as it was admitted to be done in the case at bar.

From the exhibits in the case, especially Exhibit A, appears the action of the State Civil Service Commission in this case,

in which they have set aside some twenty positions in the Ohio Agricultural Experiment Station as in the unclassified list and allowed the Director, with the consent of the Board of Control, to fill them all arbitrarily, delegating him as the person to select some person of high and recognized attainments to fill each said positions, the said Civil Service Commission having found that these persons required technical training and experience in a specialized line of agricultural work, and the commission having found from previous attempts to create eligible lists by competitive examination for such places, that competition in these cases is impracticable, because of the limited competition and the specialized requirements of the positions in question.

And their further order as found in Exhibit B, that they have exempted from the competitive, classified service the newly created position of chief of the department of animal industry. That they have made said exemption under the provisions of paragraph 12 of Section 486-8 of the Civil Service law for the reason that it appears that the position requires technical training and experience in a specialized line of agricultural work and that competition in such case is impracticable because of the limited field for competition and specialized requirements of the position.

We are not finding fault with the action of the Civil Service Commission in placing said positions in the unclassified list and waiving the necessity for competitive examination, although it does seem to the court that the Civil Service law and the Constitution of the state is being violated in spirit, if not in letter. This court does criticise the Civil Service Commission in stopping after the passage of said resolutions and certifying the same to Director Thorne, and from that time on allowing Director Thorne to act as the State Civil Service Commission in filling such appointments. We think it was the duty of the State Civil Service Commission in carrying out both the spirit and letter of the law, to have "selected some designated person or persons of high and recognized attainments and the qualities necessary to fill said positions," and certify said names to Director Thorne, which was not done in this case.

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I therefore hold that the allegations of the petition are sustained by the law and the evidence, and that the appointment of E. B. Forbes to said position was illegal and void. And it now appearing to the court that said E. B. Forbes has resigned said position and left said Station, and that said position is vacant, it is ordered that a mandatory injunction issue to the defendant to request the Civil Service Commission for a list of eligibles for said position under the unclassified Civil Service laws of the state. Said temporary injunction is made perpetual as prayed for in said petition. To all of which rulings, and findings of the court the defendant excepts, and exceptions are granted to the defendant. Motion for a new trial, if filed, is overruled, and bond of appeal, if necessary in this case, is fixed at the sum of two hundred dollars.

OFFSETTING CREDITS BY DEBTS IN A TAX RETURN.

Common Pleas Court of Cuyahoga County.

THE WHITE MOTOR COMPANY V. JOHN J. BOYLE AND JOHN A. ZANGERLE.

Decided, June 13, 1921.

Taxation—Statutory Phrase "Legal. Bona Fide Debts" as Applied to a Tax Return—Not Used in the Narrow, Technical Sense—All Debts Legally Owing Deductible from Credits.

In listing personal property for taxation, the owner is entitled to deduct from his credits all debts and obligations due and existing, regardless of whether founded on a consideration actually received, and including an obligation to pay taxes to the federal government.

LEVINE, J.

The plaintiff, the White Motor Company, seeks to enjoin John A. Zangerle, as auditor, and John J. Boyle, as treasurer, of Cuyahoga county, from adding to its tax return credits to the amount of \$1,233,000 and from collecting taxes on same.

The operative facts necessary to a determination of this case are as follows:

During the month of May, 1919, the plaintiff filed with the defendant, John A. Zangerle, as auditor of Cuyahoga county, its tax return for the year 1919, showing the total of its personal property subject to taxation as \$6,982,000, distributed as follows:

Moneys in possession or on deposit subject to order,	
on listing day, 1919	\$ 682,000.00
Average value of raw material, materials in process	
of manufacture, and finished articles	5,114,000.00
Tools and machinery	1,186,000.00
No return was made by the plaintiff of any credits owned by it. The reason assigned for that omission is, that the total of legal, <i>bona fide</i> debts, owing by said company, was greater than the total of all credits owned by it, as follows:	
Total credits	\$4,940,866.00
Total debts	6,732,107.00

The plaintiff claims that it was entitled to set off this last item of total indebtedness, therefore leaving no net credits subject to taxation in Cuyahoga county.

In the sum of \$6,732,107, being the sum total of all its debts, was included the amount of \$3,025,000, owing by the plaintiff to the government of the United States, for income and excess profit taxes for the year ending Dec. 31, 1918. The plaintiff claims the right to include this amount in its legal, *bona fide* debts. The defendant, John A. Zangerle, auditor of Cuyahoga county, refused to permit the plaintiff to include in its legal, *bona fide* debts, said amount of \$3,025,000, owing by it to the government of the United States for income and excess profit taxes for the year ending Dec. 31, 1918, as above stated.

Deducting this amount of \$3,025,000 from the total indebtedness of the White Motor Company, leaves a balance of \$3,717,107, as the total of legal *bona fide* debts of the plaintiff. Holding to that view, the county auditor accordingly allowed only said amount of \$3,717,107 to be deducted from the company's total credits of \$4,940,866, leaving an item of net credits in the amount of \$1,233,000. The county auditor entered upon

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the tax list, or duplicate, this last item, as taxable against the plaintiff for the year 1919.

The right of the plaintiff company to include the amount owing by it to the government of the United States, as income and excess profit taxes, in its legal, *bona fide* debts, rests entirely upon the interpretation of Section 5327, General Code of Ohio, reading as follows:

“*Credits.* The term ‘credits’ as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of the state, other than such as are held to be money, as hereinbefore defined, when added together, estimating every such claim or demand at its true value in money, over and above the sum of legal *bona fide* debts owing by such person. In making up the sum of such debts owing, there shall not be taken into account * * * an acknowledgment of indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor.”

What is the meaning of the phrase, “legal, *bona fide* debts owing by such person?” The defendants contend that the debts contemplated by the statute are such only as are founded on a consideration actually received by the debtor from the creditor; in other words, a debt which arose from contractual relations between the debtor and the creditor. The plaintiff contends that the phrase, “legal, *bona fide* debts” contemplates all obligations due and existing, regardless of how the obligation arose.

A careful perusal of the authorities cited in counsel’s briefs discloses that, in a strict, technical sense, “debt” implies an obligation arising from contract; or, to use the language of counsel for defendant, “a debt for which a consideration was actually received by the debtor.”

A tax, in its essential characteristics, is technically not a “debt.” It is an impost, levied by authority of government upon its citizens for the support of the state. It is not founded on contract nor agreement.

In an enlarged sense, the word "debt" means a duty to pay on any ground, and, in this sense, includes a tax.

In the case of *Gillion Co. v. Westwood County*, 13 Pac., 324, or 14 Ore., 525, the court holds:

" 'Debt,' in an enlarged sense, means a duty to pay on any ground, and, in this sense, includes a tax, though in a strict, technical sense, a tax is not a debt."

Applying to the phrase, "legal *bona fide* debts," a strict, technical definition, it would necessarily exclude taxes. Applying to the phrase, "legal *bona fide* debts," the meaning of the word "debt," in an enlarged sense, it would include all obligations due and existing on any ground, and would therefore include taxes.

What was the intent of the Legislature? Did it intend to use the word "debt" in a strict, technical sense, or did it intend to use the same in an enlarged sense? Upon the answer to that question rests the determination of this case.

An early act, passed by the General Assembly, April 13, 1852 (50 Laws of Ohio, 151), dealt with the subject of taxation. Section 10 of said act is pertinent to the purpose of this inquiry:

"In making up the amount of moneys and credits which any person is required to list for himself or any other person, company or corporation, he shall be entitled to deduct from the gross amount all moneys and credits, the amount of all *bona fide* debts owing by such person, company or corporation, to any other person, company or corporation, for a consideration received."

This last section was held unconstitutional, in *Exchange Bank of Columbus v. Hines*, 3 O. S., 1.

To remedy the defects of said Section 10, the General Assembly of Ohio passed the act of April 1, 1856 (53 Laws of Ohio 52):

"The term 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or any other valuable thing" * * * "when added together, over and above the sum of the legal *bona fide* debts owing by such person."

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Note the important omission of the phrase, "*for a consideration received.*"

Section 5327, General Code of Ohio, likewise omits the phrase, "*for a consideration received.*" It is therefore apparent that the Legislature did not intend to qualify the phrase, "*legal, bona fide debts,*" so as to limit the same to such debts only, for which a consideration was received by the debtor.

Counsel for the defendants points to the language of the last part of Section 5327, as follows:

"In making up the sum of such debts owing, there shall not be taken into account * * * an acknowledgment of indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor."

Claiming that this last-quoted language supports the contention that the phrase, "*legal bona fide debts*" is limited to such debts only, for which a consideration was received by the debtor. In this the court can not concur. An acknowledgment of indebtedness must be differentiated from "*legal, bona fide debts.*" The above-quoted language was intended by the Legislature to prevent fraud and imposition on the part of taxpayers, and it therefore provides that in making up the sum of legal, *bona fide* debts owing, no acknowledgment of indebtedness, such as the signing of promissory notes, or any other form of evidencing indebtedness, can be taken into account, unless such acknowledgment of indebtedness is founded on a consideration actually received by the debtor.

There is undoubtedly significance in the omission of the phrase, "*for a consideration received,*" following the phrase, "*over and above the sum of legal, bona fide debts owing by such person,*" and which was present in Section 10 of the act of April 13, 1852, heretofore referred to.

I shall refer to other sections of the General Code, as helpful to our inquiry.

Section 5697:

"*How treasurer to collect delinquent personal tax.* When personal taxes stand charged against a person, and are not

paid within the time prescribed by law for the payment of such taxes, the treasurer, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of unpaid taxes. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his bill of particulars or petition that the taxes stand charged upon the duplicate of the county against such person, that they are due and unpaid, and that such person is indebted in the amount appearing to be due on the duplicate."

Note the language of the Legislature, "that such person is indebted," meaning thereby the obligation to pay taxes.

Section 5698:

"On the trial of the action provided in the next preceding section, if it is found *that such person is indebted*, judgment shall be rendered in favor of the treasurer prosecuting the action, as in other cases.

"*The judgment debtor*" (speaking of the person against whom the action was brought and judgment taken) "shall not be entitled to the benefit of the laws for stay of execution or exemption of homestead, or other property, from levy or sale on execution in the enforcement of such judgment."

But Section 10714, which deals with the duty of executors and administrators to pay debts, reads as follows:

"Order in which debts are to be paid: * * * 4. Public rates and taxes."

Herein the Legislature expressly speaks of public taxes as debts.

Recurring to Section 5327, and the phrase, "legal, *bona fide* debts," used in that section; what was the purpose of this section, which in substance provides that "legal, *bona fide* debts" may be set off against credits, and that net credits only are taxable? There is but one answer. The Legislature apparently recognized the injustice of taxing credits, without regard to legal, *bona fide* debts owing by the person whose credits are sought to be taxed. Credits do not constitute a correct criterion or representation of what a person possessing same owns as his personal property. The injustice of taxing credits with-

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out regard to debts is not a debatable question. By force of said Section 5327, balances only may be taxed.

In this, the Legislature followed not only the dictates of justice, but also sound business policy, recognizing that a correct estimate of the financial standing of an individual or corporation can not be ascertained unless both sides of the ledger, debit as well as credit, are considered, and a trial balance struck. Bearing in mind the purpose of the Legislature, it is presumed that the language used by it was intended to be broad enough to carry out said purpose. If the contention of the defendants is correct, that the phrase, "legal, *bona fide* debts" is intended in a strict, technical sense, and is therefore limited to such debts only as arise from contractual relations between debtor and creditor, and for which a consideration was received by the debtor, and necessarily excluding the obligation to pay taxes to the government, then the Legislature failed of its purpose, which was to tax net credits, or balances, only.

The strict, technical construction sought for by the defendants, is, to my mind, inimical to the ends of justice, and would prove a source of oppression of the citizens of the state. The effect of it would be to tax individuals and corporations on personal property which they do not, in fact, own or possess. There are numberless obligations to pay, which arise other than from contractual relations. The obligations are nevertheless due and existing, and necessarily affect the value of the credits sought to be taxed.

The liberal construction of the phrase, "legal, *bona fide* debts," sought for by the plaintiff, is more in conformity with abstract justice, and the very purpose which the Legislature had, in passing said Section 5327.

Reference is made to the case of *Bayliss v. City of Des Moines*, 127 Ia., 124. The syllabus of the case is as follows:

"The term 'debt,' as used in Code, Section 1311, does not include delinquent taxes, in the sense that the statute authorizes a taxpayer to set forth against the assessment of his moneys and credits, the unpaid taxes of a previous year, as a debt in good faith owing by him."

It is pointed out to this court that, if the term "legal, *bona*

fide debts'' is broad enough to include an obligation to pay taxes, that persons and corporations within this state who are delinquent in the payment of their obligation to pay taxes, will be enabled to off-set the unpaid taxes of a previous year or years, as debts, thereby causing great loss to the state. This contention is groundless, for emphasis must be placed upon the words, "*bona fide*." Such delinquent taxes, while they may be considered legal debts, are not *bona fide* within the meaning of the section.

The obligation of this plaintiff to pay to the government of the United States, income and excess profit taxes, is personal in its character, and is a legal obligation. There is no question as to the good faith of this legal obligation, and it is, therefore, *bona fide*.

I therefore hold that the Legislature intended the phrase, "legal, *bona fide* debts," as used in Section 5327, to cover all obligations to pay money, due and existing, on any ground, and includes the obligation to pay taxes to the government. The test is not how the debt arose, but is it legally due and existing, and *bona fide*?

The plaintiff was entitled to include the amount of \$3,025,000 owing by it to the government of the United States, for income and excess profit taxes for the year ending Dec. 31, 1918, in its legal, *bona fide* debts, and to set off the same against credits owned by it.

Various other considerations have been urged upon this court, in support of a strict, technical definition of the word "debts," as used in the statute, among them the loss that would ensue to the state. In this, I can not concur. The state can not be said to lose by failing to obtain or keep money or funds to which it is not legally entitled. It should not seek to enrich itself by oppressive or illegal means. I have no doubt that the state authorities are actuated by a noble sense of duty in seeking to bring to the public treasury all possible funds. The ends of justice, however, require otherwise, and I therefore grant the prayer of plaintiff's petition.

The defendants are permanently enjoined as prayed for in said petition.

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**VENDOR'S LIEN SUPPORTED BY EQUITABLE INTEREST IN
THE LAND CONVEYED.**

Common Pleas Court of Pike County.

RAY BROWN v. JOHN CARR AND JULIA CARR.

Decided June 10, 1921.

Vendor's Lien Not Waived as to Purchaser—By Acceptance of Mortgage Containing False Covenants—Purchaser May Rely on Express Covenants—Notwithstanding Opportunity to Ascertain the Truth as to the Title.

1. A owns a tract of land; B arranges for its purchase. B also makes a deal with C whereby C is to take the property owned by A. B pays the consideration to A and A makes the deed direct to C. C does not pay all the purchase money to B.

Held:—That B had an equitable title in the land sufficient to support a vendor's lien in his favor for the unpaid purchase money owing him by C.

2. A vendor's lien is not waived as to the purchaser, when the vendor accepts from the purchaser a mortgage containing false covenants without knowledge of the falsity.
3. When a grantee or mortgagee protects himself by express covenants, he is not required to go further, even though the means by which he could have fully informed himself as to the title are at hand.

Blair & Blair and Levi B. Moore, for plaintiff.

Theodore K. Funk and Luther A. Thompson, for defendants.

STEPHENSON, J.

Plaintiff for a cause of action against the defendants John Carr and Julia Carr claims that on or about September 5, 1919, he bargained and sold to defendants a tract of land, to-wit:

“Situating in township of Union, in the county of Pike and state of Ohio—Being the southwest quarter of the southeast quarter of section thirty-six (36), township four (4) of range twenty-one (21), containing forty (40) acres.” for the sum of \$1,200, which defendants agreed to pay or secure to be paid to plaintiff.

That at the time of said sale, plaintiff was the equitable owner of said land, having purchased and paid Arthur Gross therefor, but the title still remained in said Arthur Gross, who agreed and was ready and willing to make title to said lands to plaintiff or to whomsoever plaintiff might direct; that defendants with full knowledge of the facts and with the purpose and intention of unlawfully and fraudulently getting the title and possession of said lands themselves, agreed to pay plaintiff therefor the sum of \$1,200, \$800 of which was to be paid and was paid plaintiff by way of part payment on real estate deeded by the defendants to plaintiff and \$400 of which was to be paid in two equal installments of \$200 each in one and two years and to be properly and fully secured.

Plaintiff further says that defendants with the purpose and intention of defrauding plaintiff and to induce him to procure the title and possession of said land to be made and given to them by said Arthur Gross, and to induce plaintiff to accept and receive a mortgage on the real estate hereinafter described as security for said sum of \$400, did falsely and fraudulently represent to plaintiff that they were at the time the owners in fee of the following described real estate:

“Situate in the county of Scioto and state of Ohio and in the township of Jefferson and bounded and described as follows: being the west one half of the northwest quarter of section 22, township 3, on range 21, containing 80 acres more or less and that the same was free and unincumbered.”

Plaintiff says that at the time of said transaction he was lead to believe and did believe that the title to the last described real estate was in defendants and was free and unincumbered and was further lead to and did direct said Arthur Gross to make the title and deliver possession of the lands first herein described to defendants and did accept and receive a mortgage from defendants on the lands last described to secure said sum of \$400, payable in one and two years.

He says that defendants were not at said time and are not now the owners of said second tract herein described, owning

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only the undivided one-eighth interest therein; that at the time they so falsely and fraudulently made said representations, they well knew said representations to be false and fraudulent.

Plaintiff further says that the interest of defendants in said premises is wholly insufficient to secure his said claim, all of which was well known at the time to defendants; that defendants have no other property upon which execution may be legally levied.

He further says he has requested defendants to secure said sum of \$400 as they agreed to do, which defendants have refused to do. He therefore brings into court the mortgage given by defendants to plaintiff and tenders the same to defendants. He says that defendants are threatening to, and will unless restrained by an order of this court, encumber and sell said first tract herein described in order to prevent plaintiff from collecting said \$400. He prays that defendants be restrained and enjoined from encumbering or selling said first tract herein mentioned; that a lien be decreed him on said first tract herein described to secure said sum of \$400 and for all proper relief.

Plaintiff by amendment to his petition claims that the \$800 paid plaintiff was paid as follows: defendants executed and delivered to plaintiff their deed of general warranty for the following described real estate: Lot No. 25 of the North Moreland Addition to the village of New Boston, Scioto county, Ohio, for the real consideration of \$2,650 to be paid as follows: \$800 to be applied upon the premises conveyed to defendants; \$1,400 to be paid by plaintiff on a mortgage held by the Royal Savings & Loan Co., given by defendants on said premises, and \$450 to be paid to the Leet Lumber Co. upon a lien held by said company on said premises.

That the deed of defendants conveying said lot in New Boston contained the following covenants:

“And the said Julia Carr and John Carr do hereby covenant and warrant that the title so conveyed, is clear, free and unincumbered and that they will defend the same against the lawful claims of all persons whomsoever.”

That at the time of making and delivering said deed, said

premises were subject to a mortgage executed and delivered to the Royal Savings & Loan Co., on or about October 18, 1917, by the then owners, Charles Fitch and Stella Fitch, predecessors in title to the defendants to secure the sum of \$1,800 and interest, and which mortgage was recorded in Vol. 91, page 369 of the records of mortgages of Scioto county, Ohio; that certain payments had been made on said mortgage, so that on September 5, 1919, there was a balance due and owing thereon of the sum of \$1,412.67.

Plaintiff says that there was likewise a mortgage on said premises executed and delivered by the aforesaid Charles Fitch and Stella Fitch on January 7, 1918, to secure the payment of \$500 and interest; that certain payments had been made thereon so that at the date of transfer to plaintiff there was due thereon the sum of \$467.25.

Plaintiff further says that at the time of the making and delivering of said deed by defendants to plaintiff, said premises were subject to state and county taxes for the year 1918 in the sum of \$19.80, and there had been levied and placed on the duplicate for collection state and county taxes for the year 1919, \$19.32, none of which had been paid and which plaintiff has since paid and he further says that on Sept. 5, 1919, one of said notes became due, no part of which has been paid, and he prays an accounting between the parties to the transaction, that the amount due plaintiff from defendants be ascertained and declared to be a lien on the premises deeded by plaintiff to defendants.

Defendants John Carr and Julia Carr admit that on or about September 5, 1919, they entered into an agreement by the terms of which they were to receive a deed of general warranty with release of dower for the property first described in plaintiff's petition, but they say that the consideration therefor to be paid by them was to be whatever sum of money plaintiff would be required to pay Arthur Gross therefor, and they deny each and every other allegation of plaintiff's petition.

Defendants by way of cross petition say that a short time prior to Sept. 5, 1919, they and John Conkel who is father-in-law of plaintiff and who is the real plaintiff herein, entered

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into an agreement the terms of which were (finally) agreed to on or about Sept. 5, 1919, and by said terms they were to pay John Conkel whatever sum of money he would have to pay Arthur Gross for the premises first described in plaintiff's petition; that John Conkel acting for plaintiff and for himself agreed to accept from defendants a deed for a certain piece of property located in New Boston, Scioto county, Ohio, at the agreed price of \$800 and the balance of the purchase price was to be secured by mortgage on real estate owned by the defendants and their sons in Scioto county, Ohio.

They say that acting in good faith they relied on the promises, statements and representations of plaintiff and John Conkel, who was acting both for himself and plaintiff, when said John Conkel and plaintiff represented that they paid the sum of \$1,200 for the property first described in plaintiff's petition; that defendants executed a deed in accordance with their agreement for the premises located in New Boston, Scioto county, Ohio, at the agreed price of \$800, and that there would have been due to said Conkel and plaintiff, if they had made no misrepresentations, the sum of \$400.

That thereupon they submitted to plaintiff and Conkel a deed for the 80 acres of land in Jefferson township, Scioto county, which deed showed who owned said tract of land, and plaintiff through his agent prepared a mortgage on said real estate and defendants signed the same in accordance with their agreement, as instructed and directed by said John Conkel and his agent who prepared the papers for defendant's signature.

They say they are unacquainted with legal terms and phrases and the proper manner of executing a mortgage; that they delivered, as aforesaid, to plaintiff, the original deed held by them for the property upon which they were to execute the mortgage; that they instructed plaintiff to prepare the papers necessary to carry out their contract; that plaintiff did so and that if any of said papers were in any degree incorrectly executed, that it was and is the fault of plaintiff and said John Conkel acting for himself and plaintiff.

Defendants further claim that Conkel acting for himself and plaintiff stated and represented to defendants that he posi-

tively would not make a profit off of them on the property first described in plaintiff's petition; that he would turn the same over to them for exactly what he or plaintiff had to pay for the property, and that both Conkel and plaintiff represented that they were compelled to pay \$1,200 for the Arthur Gross real estate; that Conkel and plaintiff willfully and knowingly misrepresented to defendants the amount they had to pay therefor and by such willfull, false and malicious misrepresentations secured from defendants a mortgage for \$300 more than they should have (executed); they say that plaintiff and Conkel, acting for himself and plaintiff, paid to Arthur Gross for the aforesaid real estate the sum of \$900 and no more, and that in truth and in fact, to carry out the contract defendants made with plaintiff and said Conkel, there would be owing to plaintiff or to said John Conkel after they had executed the deed for the property in New Boston, the sum of \$100; that said sum of \$100 is in fact the only and entire amount defendants (yet) owe to plaintiff or said John Conkel, and defendants ask that the court reform said mortgage of \$400 and correct the same in conformity with the agreement between defendants and plaintiff and said Conkel and the same be decreed to be \$100 instead of \$400; that plaintiff's petition be dismissed and for such other and further relief as is just and equitable.

An agreed statement establishes the mortgages set out in the petition and the balances due on each, also the taxes that were a lien on the property at the time of sale.

At the time of the trial, counsel was advised by the court that the issues were not made up as there was no answer to the cross petition and no reply to the answer, and it was agreed that the case be tried on the theory that a reply had been filed denying the allegations of the answer and cross petition and leave was granted to file same, and while the reply has not been filed, it has been placed with the papers and may now be filed.

The reply admits John Conkel is father-in-law of plaintiff; that the consideration for the New Boston property was \$2,650; that defendants were to pay plaintiff \$1,200 for the prop-

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erty conveyed in Pike county to defendants, and defendants executed a deed to plaintiff for the premises located in New Boston at the agreed price of \$2,650, and denies each and every other allegation contained in said answer and cross petition contained, other than the admission of facts therein stated in plaintiff's petition and prays as in the petition.

Two issues are brought into this cause under the prayer for an accounting that are not stated in the pleadings. Evidence pro and con was offered bearing upon such issues. In fact there is no dispute along that particular line. These issues grow out of the assumption by plaintiff of the mortgage on the New Boston property to the Royal Savings & Loan Co. to the extent of \$1,400, and the lien of the Leet Lumber Co. to the extent of \$450. As a matter of fact the Royal Savings & Loan Co.'s mortgage amounted to \$1,412.67, and the line of the Leet Lumber Co. amounted to \$467.25, there being an excess of \$12.67 in the first instance and \$17.25 in the second. Under all the evidence the court is of opinion that the defendants John Carr and Julia Carr should account to plaintiff for each and both said amounts and so finds.

Defendants should also account to plaintiff for the taxes that were a lien on the New Boston property at the time of sale.

Coming now to the two notes for \$200 each executed and delivered to plaintiff as part consideration for the tract of land first described in plaintiff's petition and which the court refers to as the Gross property. These notes were for a balance due on the purchase price of said Gross property, and a court of equity will declare a vendor's lien on said lands for the amount of said notes and interest, if the plaintiff was in fact the vendor and if he has not waived his lien.

Was he the vendor in fact? The admissions in defendant's answer and cross petition and the evidence render a discussion of this proposition unnecessary. Just one reference to the evidence disposes of this proposition. Arthur Gross was defendants' witness and he was asked:

"Q. When you sold your farm to Mr. Ray Brown, how much did you ask him for it?"

A. I sold it to Mrs. Carr. The check in payment was made out by Ray Brown to John Conkel and endorsed by him.

Q. How much did Mr. Brown pay you for the farm?

A. Nine hundred dollars.

Q. Was this the same property that Ray Brown sold to John Carr and Julia Carr on or about September 5, 1919?

A. I do not know."

This testimony taken together with all the other testimony in the case establishes the fact beyond all cavil that defendants recognized plaintiff herein as the vendor of the 40 acre tract of land situate in Pike county, Ohio, the legal title to which was in Arthur Gross. There is no question but that plaintiff had the equitable title. He paid the consideration and must have had the power to direct to whom Gross should make the deed, as we find that Gross did make the deed to the defendant, Julia Carr, and this was in consonance with the agreement between plaintiff and defendants entered into on Sept. 5, 1919.

The fact that Gross made the deed direct to Julia Carr does not affect plaintiff's equitable title, as equity looks to the substance of things and not the form.

The case of *Neil v. Kinney*, 11 O. S., 58, is dispositive of this proposition, and such is the law in all the states where the question has been squarely passed upon.

Defendants further claim that if plaintiff ever had a vendor's lien he waived it when he accepted the mortgage from defendants on the 80 acre tract of land in Scioto county to secure the sum of \$400, the balance of the purchase money due on the Gross land.

No question but that a vendor waives his lien when he accepts other security, if the party to be benefited thereby has done nothing to induce such vendor to accept an insufficient security.

Plaintiff did accept a mortgage security which purports to convey 80 acres of land in Scioto county, worth \$800, but it develops that the mortgagors, who are the defendants in this case, had title to the undivided one-eighth part of said land, worth as a matter of calculation \$100.

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Can it be said that plaintiff waived his vendor's lien under such circumstances? The court thinks not.

It is insisted that there is no evidence tending to show that the mortgage security is insufficient. Stenographic notes were not taken, but the court's notes taken at the time show that Ray Brown testified that said land was of the value of \$800, and it is a matter of simple division that the real security received by plaintiff for his \$400 was an undivided interest in real estate worth \$100.

Defendant contends that plaintiff took the mortgage under such circumstances that the doctrine of *caveat emptor* applies. That defendant's deed for the land upon which said mortgage was given was in the scrivener's office when the mortgage was prepared. That plaintiff's father and Conkel were agents of and acting for plaintiff and saw the deed and plaintiff had the opportunity to examine it and if he failed to do so, his mouth is closed to complain.

It is further insisted that the taking of an invalid mortgage waives the vendor's lien. That is good law, if the party to be benefitted thereby is guilty of no fraud.

But where a grantee or mortgagee protects himself by express covenants, he is not required to go further, even though the means by which he could have fully informed himself as to the title are at hand.

The defendants in this case are in no position to claim any advantage from a mortgage that furnished but one-eighth of the security they covenanted for.

The court holds that under all the circumstances in this case, plaintiff by accepting the mortgage from defendants with its false granting clause did not waive his vendor's lien.

It is further claimed by defendants that plaintiff should have tendered back to defendants, the notes as well as the mortgage which he did tender.

This court is of opinion that plaintiff was not even required to tender the mortgage.

He was under no obligation to put defendants in *statu quo*, as this is not a case of rescission or cancellation. Plaintiff does

not seek to have the invalid mortgage set aside and defendants did not accept it back, so that if the court finds that plaintiff is entitled to, or rather has not waived his vendor's lien, then he has both the mortgage and the vendor's lien as security for his debt, but in equity the mortgage security must first be exhausted then the vendor's lien foreclosed for the balance.

Coming to the claim made by defendants on their cross petition.

They claim through their arrangement with plaintiff, and with Conkel who was acting for plaintiff and himself, they were to pay only so much for the Gross land as plaintiff and Conkel paid Gross for same; that plaintiff and Conkel only paid Gross \$900 for his land, and that in accordance with their agreement they should only be required to pay them \$900, and as they have already paid \$800 they are only indebted to plaintiff in the sum of \$100 and they ask the court to reform the mortgage accordingly.

Defendants have given their two notes for \$200 to plaintiffs as consideration for the Gross land and now seek, in effect, to impeach the contract to this extent for fraud.

To do this they must furnish more than a preponderance of the evidence. Their evidence must be clear and convincing, and clear and convincing evidence must be such evidence as frees the mind from doubt, suspense or uncertainty. Before defendants can maintain their position they must prove by clear and convincing evidence that plaintiff made the agreement as they claim it to be, or that Conkel made it for plaintiff as his agent, or that Conkel made it and plaintiff affirmed it.

Defendant's testimony falls short on each and all these theories and defendants' cross petition will be dismissed.

Plaintiff is decreed a vendor's lien on the Gross land for such part of the \$400 purchase money as the mortgage fails to satisfy.

Judgment is awarded plaintiff against defendants in the sum of \$200 with interest at 6 per cent. from Sept. 5, 1919, on the note that became due Sept. 5, 1920, and it is decreed that said mortgage be foreclosed upon the interest of Julia Carr and

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John Carr in the lands in said mortgage described, and for any balance due upon said note and which the proceeds of sale under foreclosure will not liquidate, it is decreed that the vendor's lien on the Gross land be foreclosed, said lands sold and the proceeds applied to such balance, and as to the note for \$200, due Sept. 5, 1921, this cause is continued.

It is further adjudged that plaintiff recover of defendants the sum of \$69.04 with interest at 6 per cent. from the 5th day of Sept., 1919.

This amount is made up as follows: excess of the Royal Savings & Loan Co.'s mortgage above amount agreed upon, \$12.67; excess of the Leet Lumber Co.'s lien, \$17.25; state and county taxes for year 1918, \$19.80; state and county taxes for year 1919, \$19.32.

It is further decreed that defendants pay the costs of this proceeding.

Exceptions of plaintiff and defendant are noted to each and all decrees, judgments and findings of the court herein. Appeal bond fixed in the sum of \$200.

VALIDITY OF ORDINANCE PROHIBITING BEGGING.

Common Pleas Court of Franklin County.

H. D. LEFEVER v. CITY OF COLUMBUS.

Decided, June 27, 1921.

Constitutional Law—Ordinance Prohibiting Begging—Within the Police Power of the State—Police Power Defined.

1. An ordinance of a city which forbids begging by words, the exhibition of a sign, by gesture or by singing is not in conflict with Section 1, Article 1, of the Bill of Rights of the Constitution.
2. Such an ordinance is valid and is a proper exercise of the police power of a municipality under Section 3, Article 18 of the Constitution.
3. The police power of a state includes within its scope and meaning all those regulations which tend to help for the betterment of society, the preservation of property and the happiness, health, comfort, safety and welfare of mankind.

Horace S. Kerr, for plaintiff in error.

Charles A. Leach and *Charles S. Best*, for the defendant in error.

SOWERS, J.

The plaintiff in error was found guilty in the municipal court of begging and prosecutes error to this court.

The ordinance, No. 854, under which he was convicted provides as follows:

“That any person, who within the corporate limits of the city of Columbus, wanders about and begs in the streets, or from house to house, or sits, stands, or takes a position in any public place and begs from passers-by, either by words, the exhibition of a sign, by gesture or by singing, or by playing a musical instrument, or by exhibiting such articles as shoe strings, lead pencils or cheap merchandise of any description in such public place, shall be deemed guilty of a misdemeanor and upon a conviction thereof shall be fined in any sum not to exceed \$50 and the costs of prosecution.”

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It is contended by counsel for the plaintiff in error that this ordinance is unconstitutional and in conflict with Article 1, Section 1 of the Bill of Rights of the Ohio Constitution, which provides that "all men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety." In 1912 our Constitution was amended and at that time there was adopted Section 3 of Article 18, which provides as follows:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

If the above ordinance is constitutional it comes within the scope and favor of this provision of the Constitution and the police power of the state. Since the adoption of this amendment to the Constitution the Supreme Court in the case of *Welch v. City of Cleveland*, 97 Ohio St., page 311, have held that a similar ordinance punishing vagrancy, street begging and any suspicious person who can not give a reasonable account of himself, is valid and not in conflict with the Constitution.

Counsel for plaintiff in error concedes that under the police powers of a state, a municipality may make it a misdemeanor, first, for one to beg in the streets or from house to house, and, second, to beg in any public place from passers-by, but does not concede that the mere exhibition of a sign or a gesture or singing or playing a musical instrument constitutes begging. Counsel directs his argument against the ordinance very largely because in this particular instance the plaintiff is a blind person. His argument is forcible, eloquent, and makes a strong appeal to one's sentiments and sympathies and it is obvious that if such an ordinance included the blind only, its unconstitutionality would not be questioned. Anyone with human emotions has a deep interest in the welfare and the assistance of all those who are so seriously afflicted, but this ordinance is of a

general character and includes within its scope all persons and prohibits them from begging as described therein.

As an expression of human kindness, society may be reluctant to exclude the worthy blind from begging when in distress or in need, but society must consider its functions and recognize its obligations in establishing regulations of this character. It has well established agencies of a benevolent character to protect and to help its poor, its needy, its diseased and those in distress, regardless of their affliction or the causes which brought about their condition. If it is legal for a blind person to beg, it is legal for any person to beg, and if all are permitted to beg social conditions sink to the level of the tribe, our institutions disintegrate, and the government fails in those purposes for which it is organized.

It is not always simple to define the police power of a state or of a government. The courts are reluctant to give an exact definition of the meaning of the police power of a state or its limitations. It begins in the security and happiness of the home, the right to the possession of property, and its extent has not yet been defined. Out of the civil law came the maxim, *Salus populi est suprema lex*. The application of this law has developed the history of that authority which we now call "police power." Another short and terse definition is "The law of overwhelming necessity." The court in seeking a description rather than a definition of police power, has found that it is incapable of exact definition and of a precise limitation. It is the power to which are referred all governmental acts which are incapable of arrangement under any other distinct head and which are justified as internal regulations, having in view facility of intercourse between citizen and citizen, the preservation of good order, good manners and morals and the health of the public. It includes the destruction of unwholesome food, prohibition of wooden buildings in cities, regulation of railways, burial grounds, objectionable trades to certain localities, compulsory vaccination of children, confinement of the insane, restraint of beggars, suppression of obscene literature, prohibition of gambling houses, quarantine regulations,

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sanitary conditions, contagious diseases, popular education, to alleviate and prevent pauperism, regulating the occupation of transient and itinerant merchants and all those regulations which tend to help for the betterment of society, the preservation of property and the happiness, health, comfort, safety and welfare of mankind.

In its application and extension there must be justification and before a state is warranted in interfering in behalf of the public it must appear,

First, that the interest of the public generally, as distinguished from those of a particular case, requires such improvement; and,

Second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals.

When it is considered that this ordinance prohibits all from begging, it is manifest that it has been determined for the general interest of society, for its comfort, its safety and its welfare, that people should not be permitted to beg.

Counsel for the plaintiff in error makes his strong appeal against the constitutionality of this ordinance upon the ground that it is not begging for a blind person to solicit funds by sign or otherwise. It is a matter of common knowledge that the blind, the deaf and the peoples of various nationalities, find means of expressing themselves not only by spoken words but by signs, gestures and in other ways. It is obvious that one may communicate by a sign or make known his wants or wishes or desires by a significant motion. Beg means to ask, and the asking may be communicated in various ways known to human expression, and the one so asking relies upon that response or act to be answered in a particular and specified way.

In the case of *In re Haller*, 3 Abb. N. Cases, p. 65, the court uses the following language, which is directly in point:

“The act of begging alms or soliciting charity is the offense condemned by the law, in whatever form that act may be committed, and in many instances words are far less effective to accomplish the end than simple acts. The deaf and dumb man, real or pretended, who stands with a placard on the breast and

with extended hat or hand, is a solicitor of charity as completely as though he spoke to the passers-by. And so is every one whose diseased or crippled condition appeals to sympathy, if he places himself in a position to attract attention, or passes along the street, calling attention by sign, act or look to his unhappy condition, and receives from those who observe him the charity which he is obviously seeking. Indeed, the class of silent beggars who exhibit deformities, wounds or injuries, which tell plainer than words their needy and helpless condition are the most successful of solicitors for charity. * * * The intention of the law is not to punish such persons but to protect and provide for their necessities with tender care, and it would be a greater mistake to hold that the statute does not include such as by reason of their appalling misfortune, need do nothing but silently attract attention to themselves to receive gifts of charity, unasked for in words, but really solicited by far more touching appeals."

During the course of the court's study and investigation of this case letters have been sent to about twenty of the largest cities of the United States located in all parts thereof, asking information relative to laws of this character. The answers have been in every instance, except one, that those municipalities have either similar ordinances or have state statutes which prohibit begging. The validity of these laws have either not been attacked or where attacked they have been upheld by the courts. The only exception was decided apparently upon the technicality of the powers of a certain commission to make such regulations. It, therefore, appears to be the public policy of the municipalities and the states of the United States to declare themselves against begging and the upholding of such laws as embodied in this ordinance.

Under the authorities and the principles stated in this opinion, the court has reached the conclusion that this ordinance is constitutional and not in conflict with Article 1, Section 1 of the Bill of Rights, and the solicitation of charity by begging as defined in this ordinance is legally prohibited. The judgment of the lower court is affirmed.

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Stephens et al v. Pahl.

VIOLATIONS OF CONTRACT NOT TO ENGAGE IN A COMPETING BUSINESS.

Superior Court of Cincinnati.

JAMES STEPHENS ET AL V. WILLIAM PAHL.

Decided, June 25, 1921.

Vendor of a Restaurant and its Good Will—Covenants not to Enter into a Similar Business Within One Square—Becoming Manager of a Competing Restaurant Held to be a Violation of his Covenant.

1. A contract for the sale of the goodwill, chattels, fixtures, etc., of a restaurant business, containing a covenant by the defendant not to enter into said business in competition with plaintiffs for six months within one square, is valid and binding in law.
2. Where the defendant engages in said business within said square during the six months, even though he be not the owner, but is only manager, and the evidence discloses that as manager he is the active controlling force of the business, his conduct violates the contract, and injunction will lie.
3. The purpose and common intent of the parties to such a contract was to afford and assure the plaintiffs as far as the defendant was concerned, an unopposed pursuit of the restaurant business sold, for which a valuable consideration was paid.
4. Such a covenant not to compete entitles the plaintiffs not only to the protection in respect of customers and patrons, but a right to enter the field of competition unhampered by any adverse influence of this defendant.

Jos. B. Derbes, for plaintiffs.

Elmer Conway, H. A. Reeve and Williams & Ragland, for defendant.

GUSWEILER, J.

Plaintiffs pray in this cause for injunctive relief against defendant engaging in competition with plaintiffs in the restaurant business within a certain square in Cincinnati, Ohio, for a period of six months.

The written contract entered into between the parties, dated April 26, 1921, involves the sale for \$4,400 of the restaurant

business formerly belonging to the defendant located at 344 West Fourth street, together with all stock, goods, chattels, fixtures, etc. The defendant agreed also, "*that he will not enter into the restaurant business in competition with the said James Stephens and Charles Williams within one square of the said restaurant for a period of six months from the date hereof.*"

Plaintiffs claim that the defendant on June 10th, 1921, opened a restaurant at 345 West Fifth street, within one square, in violation of said contract. The defendant answers admitting the contract, but denies engaging in the restaurant business in violation thereof. The cause was heard upon its merits.

The evidence of the defendant discloses that he, his wife and son all formerly worked at the Fourth street restaurant, and are now working at the new restaurant on Fifth street; that he the defendant is the manager of the new restaurant; that he does all the hiring and discharging of help, purchases all the supplies and has general supervision of said restaurant, but he testified that the new business, managed by the defendant belongs to one Doyle, who purchased the same for \$3,600 borrowed from this defendant and secured by note. Defendant claims he loaned Doyle this amount out of the money he obtained in the sale of the old restaurant to plaintiffs. Defendant testified that Doyle is the owner and proprietor and that he is manager only, and is not engaged in the restaurant business in competition with plaintiffs.

While there were other witnesses and evidence on other parts of the case, we believe that the testimony of the defendant himself is sufficient as a matter of law, clearly indicating his connection and relation to the new restaurant. We take it that the very purpose of the contract of sale involved in this case, reciting the covenant not to engage in the restaurant business in this particular square for six months, was to eliminate the defendant as a restaurant business factor in this territory for this time. The contract is not unreasonable or in restraint and the defendant is not deprived of earning a livelihood at his regular vocation; he may pursue his business at any time any-

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where beyond his square. Evidently the object of such a contract was to avoid competition, to remove beyond reach the influence of the defendant's popularity, business ability and personal influences. Vol. 26 Am. & Eng. Anno. Cases, 291-292-293.

We are of the opinion that it makes little difference whether this defendant is owner or manager of the new restaurant. We are certain that the scope and character of defendant's employment is such as to result in all likelihood in interference with the business which was the subject of the contract of the parties. As manager, defendant is dominant, controlling influentially and effective upon the success of the business. 6 R. C. L. page 1018-1019.

The mere fact that the defendant is working upon a salary as manager and is not the owner of the business in question, will not preclude equity from giving relief, if the effect of defendant's connection therewith violates the contract in question. *Finger v. Hahn*, 42 N. J. Eq. Rep., 606.

Defendant had a legal right to sell his skill and talent in this territory for this time, and this he did and by doing so now precludes himself from entering into any competition with plaintiffs. Can it be questioned but that defendant's conduct and connection with the new restaurant is within the spirit and letter of violation of this contract not to engage in business in this square during the six months provided for? On the question of the interpretation of the word "*competition*" while there are various definitions and constructions given, nevertheless, it can not be denied that the new restaurant is wholly dependent upon defendant as its manager for the success and profitable conduct, and if so, he, the defendant is creating and maintaining competition against these plaintiffs.

The test as to the question of competition and violation on the part of this defendant of his covenant not to engage in like business, is mischief. And mischief begins when the scope and character of the defendant's employment is such as to result in all likelihood in substantial interference with the business which was the subject of the contract. And it will not do to

say that there can be no interference if the defendant shall refrain from any act which can operate to induce the customers of the old business to transfer their patronage to his new employer. Influence may be exerted indirectly as well as directly, and the plaintiffs in purchasing the business and its good will are entitled not only to protection in respect of customers and patrons, but to enter the field of competition unhampered by any adverse influence of this defendant. 35 Vol. Am. & Eng. Anna. Cases, page 383. It does not matter how or in what name defendant acts, if he in fact carries on the business he agreed not to carry on, he is acting, he is breaking his promise whether he acts as principal or agent. *Fenger v. Hahn*, 42 N. J. Eq., 606.

The common intent of the parties to this contract was to afford and assure the plaintiffs as far as the defendant was concerned, an unopposed pursuit of the restaurant business sold to the plaintiffs and for that they paid a valuable consideration *Smith v. Webb*, 176 Ala., 596.

A point raised by counsel for the defendant claiming that a square was restricted and defined by a certain city ordinance so as to exclude the restaurant in question is answered by noting the fact that this ordinance was passed several months subsequent to the date of the contract and relates only and especially to a specific subject not including this business. Our opinion is that the restaurant in question is located within the square as described in the contract. The municipal house numbers on Central avenue and other north and south streets run from Fourth to Fifth street beginning with 400 without regard to a small narrow intervening street between Fourth and Fifth streets, thus indicating numbering by blocks or squares.

It follows and we hold that the plaintiffs having paid unto the defendant \$4,400 for the chattels, fixtures, good will, etc., with a covenant on the part of the defendant not to engage in the restaurant business in said square during six months, that the defendant can not act as manager or in any capacity in said restaurant business during the term of said contract. An order may be taken in keeping with this finding.

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Groat v. Wilkinson, Admr.

TRUST NOT CREATED BY DECLARATION OF AN INTENTION.

Common Pleas Court of Hamilton County.

MINNIE GROAT V. FRANK O. WILKINSON, ADMR.

Decided, April Term, 1921.

*Statements by a Decedent as to the Proposed Gift of a Bank Deposit—
Not a Sufficient Basis for Establishing a Trust in the Fund so Des-
ignated—Bar of the Statute Against an Action on an Obligation of
a Decedent where not Brought Within the Eighteen Months Period.*

1. A declaration by a decedent shortly before his death that in consideration of love and affection and for services rendered he would give to G the deposit which he had in a certain designated bank, does not create a trust *in praesenti* in said fund upon which recovery may be had from his administrator.
2. An action against an administrator for recovery for such services as amount equal to such a fund is an action on a claim or debt and is barred if not brought within eighteen months from the date of the appointment and qualification of the administrator.

Joseph T. Harrison, for plaintiff.

O'Connell & O'Connell and *Jones, LeBlond, Morrissey & Terry*, for defendants.

MATTHEWS, J.

This case comes before the court upon the defendant's motion for judgment on the pleadings.

It appears from the admissions of the plaintiff, found in the pleadings, that she is seeking to recover judgment against the defendant as administrator of the estate of Robert J. Johnston, deceased; that the defendant was appointed administrator of said decedent's estate on July 25, 1917, at which time he duly qualified, and at the same time gave notice of his appointment by publication in the manner provided by law; that the plaintiff presented to the said administrator her affidavit in proof of a claim asserted in this action on the 6th day of May, 1920, and the defendant rejected it on the 7th day of May, 1920; and this action was filed on the 8th day of May, 1920. It thus appears

from the admissions in the pleadings that the claim sued upon was not presented to the administrator for more than eighteen months after his appointment and qualification, and the publication of notice of his appointment, and suit was not filed thereon within eighteen months of said appointment, qualification and publication. It also appears that the cause of action accrued upon or prior to the death of the intestate.

The ground of the defendant's motion is that upon these admissions contained in the pleadings, it appears as a matter of law that the plaintiff's cause of action is barred by the limitation contained in Section 10746, General Code, by which it is enacted that

"No executor or administrator, shall be held to answer to a suit of any creditor of the deceased unless it be commenced within eighteen months from the time of his giving bond."

This section was construed in the case of *Harris v. O'Connell, Admr.*, 85 O. S., 136, and the court there held that the limitation prescribed in that section applied to all matured claims owing at the death of the decedent, even though the six months period after the rejection of the claim had not expired.

Counsel for the plaintiff has urged that Section 10746, General Code, is not applicable excepting to claims against the decedent upon which a personal judgment alone might be rendered, and is entirely inapplicable to cases in which the plaintiff seeks to assert a proprietary right or title in specific property in the hands of the personal representative of the decedent.

By Section 10717, General Code, the method of probating "claims" against a decedent's estate is prescribed, and by Section 10722 is prescribed the period of six months after rejection, within which the claimant must institute action, or be forever barred; and in this section the subject matter is referred to as "a claim," and as a "debt."

In view of contention of counsel for the plaintiff, and this language of the statutes, it is pertinent to inquire how the courts have construed statutes containing similar language.

In *Fallon v. Butler, Exec.*, 21 Cal., 24, the court in constru-

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ing the word "claim" as used in the probate code of that state, decided as stated in the syllabus, that:

"The term 'claims' as used in the act, does not embrace mortgage liens, but has reference only to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered."

In *Fish v. DeLary*, 8 S. D., 320, the court applied the reasoning of *Fallon v. Butler*, to a mechanic's lien, and held that the lien might be foreclosed without the claim having been previously presented to the administrator for allowance or rejection, and at pages 320 and 321, the court on this subject said:

"The primary object of the statutory provision requiring a claim against the estate of a deceased person to be presented within a specified time is to apprise the administrator and the court of the existence thereof, so that a proper and timely arrangement may be made for its payment in full, or a *pro rata* portion thereof, in the due course of administration. Like the lien of a mortgage which survives the obligor, and is enforceable by a foreclosure and sale of the incumbered property, a debt evidenced by a verified, itemized statement, of the amount due, which is secured by a mechanic's lien made of record, so that the world is charged with notice of its existence and amount, ought not to be barred and lost, so far as it affects the property subject thereto, by failure to present the claim thus secured. Without such presentation, the administrator is presumed to know of the existence of the demand, and the specific lien for its enforcement, which takes precedence, at least, over all subsequent incumbrances."

The same principle was applied in *Vandever's Administrators v. Freeman*, 20 Tex., 333, to a case in which the plaintiff sought to have the court declare and enforce a trust in certain real estate of which the legal title was in the decedent at the time of his death; and answering the contention of the defendant in that case the court at page 336 says:

"It is objected to this proceeding, that as a suit for land it is wrongly prosecuted in Burnett county, the land being situated in Gillespie county; and as a suit for money it must fail, be-

cause the claim was not presented to the administrators. These objections presuppose a state of case that does not exist. For the suit is not for the recovery of the land, or for the recovery of a claim against the estate of Vandever, but it is to quiet the title by a cancellation of the deed if practicable, or to trace a trust from land to money through the estate; which it is competent for a court of equity to do."

The Supreme Court of Alabama, in *Hood, Admr., v. Hammond*, 128 Ala., 569, held that a vendor's lien on land could be foreclosed notwithstanding the fact that the purchase money notes had not been presented to the vendee's administrator, and were therefore barred as personal claims against the decedent's estate, holding as stated in the syllabus:

"The failure of a vendor to present notes given by his vendee for the purchase money of land, to the latter's administrator within the time required by the statute of non-claim, or to file such notes in the probate court within nine months after the declaration of insolvency of the vendee's estate, does not destroy the vendor's lien or cut off all remedy for its enforcement."

And discussing at page 578 the effect of the failure to present the notes to the administrator, the court says:

"Such failures would only operate to bar the right of the vendor to participate in the distribution of the estate."

In *Franklin v. Trickey*, 9 Ariz., 282; 11 Ann. Cases, 1105, it was held that the right of a deceased partner's administrator in the partnership assets, need not be filed with the administrator of the other partner before filing suit to recover the proportion of the partnership assets.

And the same principle was applied in our own state in the case of *Ambrose, Admr., v. Byrne, Exec.*, 61 O. S., 146, to the enforcement of a judgment lien, the court deciding as stated in the syllabus that:

"1. Where a judgment is a subsisting lien on the lands of the debtor at the time of his death, it is not necessary thereafter to issue execution upon it in order to preserve the lien. It is entitled to share in the proceeds of the land, when sold

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by the personal representative, according to its priority at the time of the debtor's death, although execution be not issued thereon within five years from its rendition or the date of the last execution.

"2. The allowance of the claim by the personal representative, or its presentation to him for that purpose, is not requisite to the judgment creditor's right to share in the fund."

From these authorities it would seem to the court that the statutes of Ohio prescribing that "claims" must be presented to the personal representative, and where the "debt" is due at the time of the death of the decedent, the suit must be filed thereon within eighteen months of the appointment, qualification, publication of notice of appointment, and also within six months of the rejection of the claim, must be limited according to their terms to personal obligations of the decedent, and have no application to a case in which a plaintiff seeks to assert title, legal or equitable, in specific property in the hands of a personal representative.

It therefore becomes necessary to consider the allegations of the petition in the light of the authorities, to determine the character of the cause of action which the plaintiff is seeking to enforce.

In the petition are stated facts showing that the plaintiff rendered certain services to the decedent, and that is followed by these allegations:

"That in consideration of love and affection and her said work and labor, for him and his said wife, and upon numerous occasions prior to the said death of Robert J. Johnston, he promised that upon the happening of his death, the plaintiff should become the owner of all the assets of his estate; that prior to the death of his said wife, she said in his presence that at their death (meaning the deaths of herself and husband) they would leave a 'Nest Egg' for her (meaning this plaintiff); that on Saturday, June 30, 1917, shortly before he died, and when he came to plaintiff's home, he promised and said, 'Minnie that Nest Egg that "Auntie" (meaning his deceased wife) and I told you about, I have provided for you, and it is on deposit in the Evanston Bank,' meaning the bank of that name in the city of Cincinnati, Ohio.

"Plaintiff says that at the time of the death of said decedent

there was on deposit in said Evanston Bank the sum of \$1,300 in the name of said Robert J. Johnston, deceased, and is the same so promised and agreed by him should be paid to plaintiff upon the death of said decedent."

Following the quoted language is an allegation of the presentation of proof of claim, and the prayer is for "judgment in her favor in the sum of \$1,300 with interest from July 21, 1917."

From these allegations does it appear that the plaintiff is asserting some title, legal or equitable, in a *res* in the hands of the defendant, or does it appear that the plaintiff is seeking to enforce a personal obligation of the decedent against his estate, upon which if successful, she would be entitled to a *pro rata* distribution as one of the creditors of the estate?

Counsel for plaintiff relies confidently upon the case of *Gemin v. Salisbury, Admr.*, decided by the Montgomery county common pleas court, and reported in the O. L. R. of March 29, 1920.

In the opinion of the court, however, that decision is not applicable to the allegations contained in the plaintiff's petition. It was claimed in that case that the plaintiff was asserting a title to a trust fund, and that therefore it was not necessary to present the claim for allowance to the personal representative, but there also appeared in that case the additional circumstances that the \$2,000 which plaintiff claimed had been segregated by the decedent and made a trust fund for her, had been withheld from the administrator because of litigation, and had just recently been paid to the administrator, and it was argued that said sum constituted assets coming into the hands of the personal representative, which under favor of Section 10747, were available to creditors notwithstanding the expiration of a greater period than eighteen months. And the court after reviewing the authorities, and construing the Ohio statutes, reached the conclusion that the plaintiff's claim considered as a personal obligation of the decedent, had been presented in due time for the purpose of participating in the assets that had just come into the hands of the administrator. That the decision of the case was predicated upon that conclusion of the court is ex-

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pressly stated in the court's opinion, at page 329, in this language:

“For the purpose of this decision, the court will only consider one question raised by the pleadings, and that is, whether or not the \$2,000 in the manner in which it came into the hands of the defendant, is or is not in fact new assets.”

The court, therefore, does not regard the case of *Gemin v. Salisbury, Admr.*, as in any way controlling this case, for the reason that there is no allegation that additional assets came into the hands of the defendant in this case, after the expiration of eighteen months. The plaintiff must therefore recover, if at all, upon the theory that during the lifetime of the decedent he divested himself of the equitable title to the deposit of \$1,300 in the Evanston Bank, and invested the plaintiff with that equitable title or lien.

It is claimed that because the decedent was indebted to the plaintiff, and that in view of that indebtedness, the decedent made the statement with reference to the deposit in the Evanston Bank, that a court of equity upon equitable principles, will give a remedy to the plaintiff as though a trust or lien had been created, notwithstanding the fact that language had been used, which in the absence of consideration would not have had the effect of severing the legal and equitable title and creating a trust, or giving a lien.

The distinction between expressions of donation and declarations of trusts is clearly stated in *Flanders v. Blandy*, 45 O. S., 108. At page 115 the court says:

“If a gift is imperfect at law, and for want of consideration can not therefore be enforced, a court of equity will not aid the donee by construing it into a declaration of trust. In *Milroy v. Lord*, 4 De Gex. F. & J., 264, in referring to the modes of making a voluntary settlement, the principle is announced that if the settlement is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. The owner of property that is meant to be donated, may at the last moment before delivering it change his mind, and in such case equity

will not virtually divest him of his property by creating a trust in favor of a volunteer.”

Where the situation shows that a consideration exists for the creation of a trust, that is, where as in this case the prior relation of debtor and creditor existed, it is clear that if the debtor intended, and used appropriate language to express the intent to change the relation of debtor and creditor into the relation of trustee and *cestui que trust* as to specifically designated property, or to give a lien upon said property, then a court of equity would decree a specific performance of the contract to create the trust or lien, in the event the trust or lien was not entirely created by the contract itself, and would in addition to that afford to the *cestui que trust* the remedy of having the trust declared and enforced in his favor or the lien foreclosed. But before a court of equity can furnish these remedies, and before a contract upon consideration can have the effect of severing the legal and equitable titles it must appear from the contract itself that such was the intention of the parties; and for the purpose of determining the intention of the parties in the use of language, it does not seem to the court that there is any material distinction between the cases in which trusts have been voluntarily created, and those in which there was a consideration therefor.

In the case of *Sullivan v. Sullivan*, 56 N. Y. Supp., 693, it was sought to enforce as a voluntary declaration of trust, a certificate of deposit evidencing a fund deposited in a bank by a decedent, the language of the certificate being:

“Chemung Canal Bank. Elmira, N. Y., Oct. 10, 1892.

“Catherine Sullivan has deposited in this bank two thousand dollars, payable one day after date to the order of herself, or, in case of her death, to her niece, Catherine Sullivan, of Utica, upon return of this certificate, with interest at three per cent. per annum, if held six months. Not subject to check.”

The court reviewed a great many cases, and among other things said, at page 695:

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“Such deposit created the relation of creditor and debtor between the depositor and the bank. The fund remained the property and under the absolute control of the former. To have the effect of creating a trust in favor of the defendant, the contract between Mrs. Sullivan and the bank should, at the time of its execution, have divested the former of title to the fund, or of some interest therein, and vested such interest in the defendant. Such was not the effect of the certificate. The clause in the certificate for the benefit of the defendant could not take effect until after the death of Mrs. Sullivan. The latter did not divest herself of control over the fund during her lifetime. She could use it or withdraw it. She did not, by her contract with the bank, divest herself of the possession, absolute control, or title to said fund. To create a valid trust in favor of the defendant, the certificate should have given to her, or a trustee for her, a vested interest in the deposit, created at the time—a title to the deposit, or of some interest therein. As it was, such interest as was attempted to be given to the defendant under the certificate was only to take effect after the death of the donor, and hence was testamentary in its character.”

Applying the foregoing rule to the language used by the decedent as alleged in the petition, it is clear that the decedent did not divest himself of any title to the deposit; that the deposit remained in the bank all the time under the absolute control of the decedent, and that under the language used it was not the intention of the decedent to transfer immediately an interest to the plaintiff in the fund, but that it expressed only a purpose or expectation to have that sum of money devolve upon the plaintiff upon the death of the decedent. That such statements can not be considered to be declarations of trust, was held in the case of *Clay v. Layton*, 134 Mich., 317. The second paragraph of the syllabus is:

“Statements by a person retaining possession of his property, that he has disposed of it in the way he wants it to go, do not amount to a declaration of a trust, as they are as consistent with the idea that he has made a will as that he is holding the property as a trustee.”

In that case the decedent had reduced to writing the man-

ner of disposition of his property, but had not made any actual distribution of the papers or property, and the court held that there was nothing in his acts or instructions which "indicates an intention that effect shall be given to the papers before his death."

The mere fact that there is a consideration is not the only element necessary to invoke the jurisdiction of a court of equity to enforce a trust. Where the trust is voluntary the language must show an intention to create the trust *in praesenti*. Where there is a consideration, it is not sufficient to show that there was a contract based upon that consideration, but it must likewise be shown that the contract was to *create a trust in praesenti*. This is stated in *Dennison v. Goehring*, 7 Pa. S., 175, at 178, where the court say:

"But is it true that equity will not enforce an executory trust in favor of a volunteer? It will doubtless not enforce a contract *to create* a trust, though it were under hand and seal; and in this respect it carries the doctrine of *nudum pactum* further than even the law does; but the difference between a covenant to *create* a trust and a trust *created*, is as wide as the difference between a covenant to convey and a conveyance executed."

The case of *Donohoe v. Conrahy*, 2 Jones & L., 688, is one in which the plaintiff sought to enforce what she alleged to be a trust founded upon consideration, but the court after analyzing the evidence found that there was no contract to create a trust, and on page 695 summarized its deductions from the evidence as follows:

"No promise is either alleged or proved in this case; for the evidence amounts only to a statement of what may amount to an admission of an intention, on the part of the lessee, that these persons should have the same benefit of the lease to him, which they had before."

In the case of *Hamer v. Sidway*, 124 N. Y., 538, there was a consideration for the declaration of trust in that the relation of debtor and creditor existed between the parties, but notwith-

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standing that the court analyzed the evidence carefully to determine whether in what was said by the debtor to the creditor, and the creditor's response thereto, an agreement had been entered into between them to transform the relation of debtor and creditor into the relation of trustee and *cestui que trust* of specifically identified property. The discussion of this subject by the court will be found on pages 549, 550, 551, and is instructive in showing the difference between that case and the one stated in the petition in the case at bar.

In *Cook & Co. v. Black*, 54 Iowa, 693, the Supreme Court of Iowa applied the law to facts very similar to those alleged in the petition in this case, and held as stated in the syllabus that:

"The fact that a decedent in his lifetime had frequently declared his intention to pay certain indebtedness to the plaintiffs from the proceeds of a number of cattle owned by him was held insufficient to create a lien in favor of the plaintiffs upon the fund arising from the sale of the cattle by the executors."

In that case as in this the relation of debtor and creditor existed between the claimant and the decedent, the latter declared his purpose to pay the indebtedness out of specific property, and the court held as stated in the syllabus that the claimant thereby acquired no title in the specific property.

Analyzing the allegations of the petition in the light of these authorities, it does not appear that the decedent intended to invest the plaintiff with the title to the deposit in the Evanston Bank, but on the contrary it appears that he retained absolute control of that deposit during his lifetime, and that this intention of control was in harmony with the language he and his wife used in referring to the deposit, in conversation with the plaintiff. The language used only showed that they at that time had a purpose or intention to make some sort of an arrangement whereby upon the death of the decedent she should have the bank deposit; that language is entirely consistent with the intention to make a will containing such a disposition of the bank deposit. Furthermore there is no allegation that the plaintiff agreed to a change in the relation of debtor and creditor to that

of trustee and *cestui que trust*, and that relation could not be so changed without her agreement thereto.

It is a rule in Ohio that the degree of proof required in cases of this sort, is that it must be established by clear and convincing evidence. *Merrick v. Ditzler*, 91 O. S., 256 at 261.

If such degree of proof is required, then it is clearly the rule that the expression necessary to create a trust must be clear, convincing and unambiguous, and it has been so decided. *Roddy v. Roddy*, 3 Neb., 96.

For these reasons the court is of opinion that the cause of action set forth in the plaintiff's petition is one seeking to enforce a personal obligation of the decedent, and is not one seeking to assert a title to specific property in the hands of the administrator. While pleader's prayer is not conclusive in determining the character of the action, it is to be noted that the prayer of the petition in this case only seeks a judgment for money, and does not seek to have the plaintiff's title to any property declared and enforced. Even though a trust relation previously existed between the decedent and the plaintiff, if that trust relation no longer existed, or for any reason was not relied upon, and the only relief sought was the enforcement of a personal obligation against the decedent's estate, the cause of action would be a claim or debt, which under the statute must be proven, and suit filed within the time prescribed. See *Robson v. Evans*, 3 Ohio App., 248.

The motion for judgment on the pleadings is granted.

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Wilkins v. State.

PROSECUTIONS UNDER THE CRABBE AND MILLER ACTS.

Common Pleas Court of Clermont County.

WILKINS v. STATE OF OHIO.

Decided, August, 1921.

Intoxicating Liquors—Prosecutions for Selling, Possessing and Keeping a Place Where Sold—Final Jurisdiction of Mayors, Justices of the Peace, etc., in Liquor Cases—Jurisdiction of Mayor in Village Lying in Two Counties—Final of Trial by Jury—Validity of Warrants of Arrest.

1. A prosecution for keeping a place where intoxicating liquors are sold, furnished or given away is in no way authorized by the Crabbe act, but falls under Section 13195 which has been in full force and effect for two generations or more.
2. Under the Miller act, a mayor, justice of the peace, municipal or police, probate or common pleas judge, have final jurisdiction within their respective counties of all misdemeanors arising in their counties under laws relating to intoxicating liquors or providing for the enforcement of laws relating to intoxicating liquors.
3. The jurisdiction of the mayor of a village situated in two counties is co-extensive with both counties. In the exercise of such jurisdiction he need have but one office, and an affidavit upon which a warrant of arrest was issued is not rendered defective by reason of the fact that it was sworn to before the mayor while sitting in the county of his jurisdiction other than the one in which the offense was committed.
4. An act establishing a municipal court is a special grant of legislative power on a particular subject, and in no way contravenes the constitutional requirement that all laws of a general nature shall have uniform operation throughout the state; the Miller law, therefore, takes precedence over laws creating municipal courts in so far as its terms are in conflict with the municipal law.
5. Prosecutions for the manufacture, sale, having in possession or giving away of intoxicating liquors come under the Crabbe act, and are not rendered invalid by reason of the fact that the affidavits upon which the warrants of arrest were issued failed to negative the exceptions authorized by the act.

Walter Murphy, for George Wilkins.

D. W. Murphy and H. E. Joseph, for the State.

WM. A. JOSEPH, JUDGE.

This is a motion by George Wilkins for leave to file a petition in error, transcript, and bill of exceptions in this Court.

George Wilkins was convicted and fined \$500.00 and costs in the mayor's court of Milford, Ohio, for unlawfully keeping a place where intoxicating liquors were sold, from the first day of June, 1921, until the twentieth day of July, 1921, in Cincinnati, Hamilton County, Ohio, contrary to Section 13195 of the General Code of Ohio, and is now requesting leave of this court to file a petition in error from the proceedings had before and the decision of M. B. Scott, mayor of the village of Milford, Ohio.

There were several errors claimed and urged by plaintiff in error before this court as reasons why he should be permitted to file the petition in error.

Plaintiff in error cites the Crabbe act and claims that the affidavit, upon which the warrant for his arrest was made, is defective in that it is sworn to before Mayor Scott of Milford, Clermont county, Ohio, while the crime is alleged to have been committed in Hamilton county, Ohio.

In fact, this alleged misdemeanor does not come under the Crabbe act at all, but it does come under Section 13195, General Code, which provides as follows: "Whoever keeps a place where intoxicating liquors are sold, furnished or given away in violation of Law, shall be fined, etc."

Section 3, of the Crabbe act, provides, "that no person shall manufacture, sell, barter, transport, import, export, deliver, furnish, receive, give away, prescribe, possess, solicit, or advertise any intoxicating liquors, except as authorized in this act."

It will be seen that the Crabbe act in no place provides for keeping a place where intoxicating liquors are sold etc., and so for as this motion is concerned, we will have to look to the law other than the Crabbe act, excepting any laws that may refer directly to or by implication to the Crabbe act.

Section 19, of the Miller act, which was passed February 2nd, 1921, and approved February 9th, 1921, provides as follows:

"Any justice of the peace, mayor, municipal or police judge, probate or common pleas judge, shall have final jurisdiction with-

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in their respective counties of all misdemeanors arising in such counties under this act, or under laws relating to intoxicating liquors of laws providing for the enforcement of such laws.”

The Crabbe act and the Miller act are both law enforcement acts.

The said village of Milford is located in both Hamilton and Clermont counties.

Section 3539, General Code, provides as follows:

“When the jurisdiction of municipal officers is co-extensive with the county in which the corporation is situated, their jurisdiction in corporations embracing territory of more than one county shall be co-extensive with each of the counties in which any part of such territory is located.”

It seems clear that under this section, the jurisdiction of Mayor Scott is co-extensive with both of the counties of Hamilton and Clermont in cases of this kind.

Section 4550, General Code, provides as follows:

“He (the mayor) shall keep an office at a convenient place in the corporation, to be provided by the council and shall be furnished by the council with the corporate seal of the corporation, in the center of which shall be the words, ‘Mayor of the village, etc.,’ as the case may be.”

The court is of the opinion that the affidavit upon which the warrant was issued in this case is valid because the council having furnished the mayor a convenient place in the corporation in which to keep his office, he has a right to swear an affiant to an affidavit in the place provided for him by the council of said village. I mean by this statement, the mayor does not have to change the place of his office from the Clermont county side and go on the Hamilton county side of said village to swear an affiant to an affidavit for a warrant for a misdemeanor committed in Hamilton county or *vice versa*, if his office is in that part of the village which is in Hamilton county, he will not have to change his office from the Hamilton county side to the Clermont county side in order to swear an affiant to an affidavit for a warrant for a misdemeanor committed on the Clermont county side.

Section 3539, General Code, enlarges the jurisdiction of mayors in corporations embracing a territory of more than one county, and in construing Sections 4550 and 3539, General Code, together, the court is of the opinion that a mayor need have but one office in the village of which he is mayor in order to exercise jurisdiction co-extensive with the counties in which the village is located.

Another matter mentioned in the argument of counsel assails the jurisdiction of a mayor or justice of the peace, residing and maintaining an office in the county outside of the corporate limits of Cincinnati, because Section 1558-41, General Code provides as follows:

“No justice of the peace in any township in Hamilton county, other than in Cincinnati township, nor mayor of any village or city in any proceeding, whether civil or criminal, in which any warrant, order of arrest, summons, order of attachment or garnishment or other process except subpoena for witness shall have been served upon a citizen or resident of Cincinnati or a corporation having its principal office in Cincinnati, shall have jurisdiction, unless such service be actually made by personal service within the township, village or city in which said proceedings may have been instituted, or in a criminal matter unless the offense charged in any warrant or order of arrest shall be alleged to have been committed within said township, village or city.”

The criminal jurisdiction of justices of the peace and mayors of villages has always been co-extensive with the county until restricted by the different acts creating municipal courts.

The acts creating municipal courts do not offend or contravene Section 26, Article 2, of the Constitution of Ohio, requiring all laws of a general nature to have uniform operation throughout the state as the establishment of a municipal court in Cincinnati is by special grant of Legislative power upon a particular subject. See *State ex rel vs Hesse*, 93 O. S. page 231; *State ex rel vs Block*, 65 O. S. page 370; *State ex rel vs Yeatman*, 89 O. S. page 44.

The Miller act is created in exactly the same way. Were it not for the Miller act, the court has no hesitancy in saying, that the

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mayor of the village of Milford would have no jurisdiction in this case, because this alleged misdemeanor does not come under the Crabbe act. See Section 9, Article 15, Constitution of Ohio. Section 19, of the Miller act, passed February 2, 1921, and approved February 9, 1921, and which was a law and in effect at the time of the alleged misdemeanor charged in the affidavit.

Section 19, of the Miller act, provides as follows:

“Any justice of the peace, mayor, municipal or police judge, probate or common pleas judge, shall have final jurisdiction within their respective counties of all misdemeanors arising in such counties under this act, or under laws relating to intoxicating liquors, or laws providing for the enforcement of such laws.”

The Legislature has the power to enlarge or diminish the jurisdiction of justices of the peace, and mayors of municipalities.

The Miller law was passed last winter and became a law subsequent to the law creating municipal courts, and therefore takes precedence over the law creating municipal courts in so far as its terms are in conflict with the municipal law.

If the Legislature had intended to curtail the jurisdiction of justices of peace and mayors so that they should have no jurisdiction, in cities having municipal courts, of misdemeanors committed therein, in this class of cases, it would have said so. There are no exceptions and the Legislature must have meant what it said. While repeals by implication are not favored by the law, still when the terms of a later act are so inconsistent with the terms of a former act that all can not stand, the terms of the later act that are in conflict with the terms of a former act will prevail.

Counsel for plaintiff in error further complained because plaintiff was denied the right of trial by jury. It is the well established law of this state by a long line of decisions to the effect that in misdemeanors wherein imprisonment is not a part of the penalty, the Legislature can lodge final jurisdiction in the trial courts to the exclusion of the right of trial by jury, and in accordance with this well established principle of law the Legislature has provided in Section 4536, General Code, the following: “He (the

mayor) shall have final jurisdiction to hear and determine any prosecution for a misdemeanor unless the accused is by the Constitution entitled to a trial by jury. His jurisdiction in such cases shall be co-extensive with the county, etc." Also, see the Miller act, Section 19.

The plaintiff in error further complains against the decision of Mayor Scott, of Milford, on the grounds that the decision is against the weight of evidence. The court has carefully gone over the evidence in this case, and is of the opinion that the judgment of the mayor is sustained by the evidence. The state inspectors testified that they bought whiskey in this place on two or three different occasions between the first day of June and the 20th day of July, 1921, and that on the last day in which it was bought there by the state officer, the plaintiff in error sold it to him and admitted that he was the owner of the place.

This is an action for unlawfully keeping a place where intoxicating liquors are sold, furnished, exchanged or given away in violation of the law, and is not for the unlawful selling of liquor; and in the case of *Spfortza et al v. State of Ohio*, 11 Ohio Appellate Reports, page 332 (32 O. C. A., —), it is held that the proof of a single sale of intoxicating liquors is not indispensable to a conviction for keeping a place for the unlawful sale of intoxicating liquors.

There was evidence to the effect that on the day Mr. Wilkins was in his place of business, that he emptied some whiskey into a sink in order to prevent the state prohibition officer from taking it. There was evidence that a bar tender was in attendance, during the business hours of this place, adorned in the usual regalia, and the appearance of the place was that of a saloon; and that from day to day, persons were seen going in and out of the place. There was also evidence that several had purchased whiskey several times within the time stated in the affidavit.

Mayor Scott saw and heard these witnesses on the stand and had the opportunity to observe their demeanor while on the stand and was in a better position to know what weight to give to their testimony than a reviewing court. The court is, there-

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fore, of the opinion that the evidence adduced in this case as exhibited by the bill of exceptions is amply sufficient to sustain his decision.

It was claimed that the evidence as to the proprietorship of the plaintiff in error of this place was not sufficient from the evidence shown by the bill of exceptions. The court is of the opinion that the proprietorship was established by the evidence, and that the plaintiff in error, George Wilkins, was the proprietor of this place at and prior to the time of his arrest.

Counsel for plaintiff in error claims that the affidavits upon which the warrants of arrest were issued fail to negative the exceptions authorized by these acts. If the selling or possessing of liquor, etc., might be legal, is in the description or definition of the offense, then it would be necessary to negative these averments in the affidavits, but in as much as they are contained in the provisos, the offense is complete in charging one with the offense without negating the exceptions. See *State v. Hutchinson*, 55 O. S., 573; also, 49 O. S., 117.

The motion, therefore, for leave to file a petition in error in this case is denied.

UNSUCCESSFUL PROSECUTION OF A VENDOR OF HENRY FORD'S "DEARBORN INDEPENDENT."

Municipal Court of the City of Cleveland.

CITY OF CLEVELAND V. MILTON A. COULSON.

Decided April, 1921.

Scandalous Publication—Allegations Concerning Must State What Therein Contained Is Indecent or Likely to Create a Breach of the Peace.

An Affidavit charging that one C "did then and there offer for sale on East Ninth and Euclid avenue, within the limits of said city (Cleveland), a certain indecent and scandalous publication, to-wit, the 'Dearborn Independent,' the same being calculated to excite scandal and having a tendency to create a breach of the

peace," does not state a crime under Ordinance 1770 of said city, where said publication is found upon inspection to contain numerous articles of a creditable character and there is nothing in the affidavit to indicate what article or articles it is intended to charge are calculated to excite scandal or create a breach of the peace.

Oscar C. Bell, Police Prosecutor, *M. P. Mooney*, and *John D. Marshall*, Assistant Director of Law, for the State.

Squire, Sanders & Dempsey, by *Harry Crawford* and *Ernest Dempsey*.

The accused was brought to trial upon the following affidavit:

"Before me, E. L. Hilliard, Deputy Clerk of the Municipal Court of Cleveland, personally came A. H. Wilks, who being duly sworn according to law, deposes and says, that on or about the 14th day of March, A. D. 1921, at the said city and county, one Milton A. Coulson did then and there unlawfully offer for sale on E. Ninth and Euclid Avenue, within the limits of said city, a certain indecent and scandalous publication to-wit. 'The Dearborn Independent,' the same being calculated to excite scandal and having a tendency to create a breach of the peace. A copy of said publication is here attached. And further deponent says not; contrary to the form of an Ordinance of said City in such cases made and provided.

A. H. WILKE.

Sworn to and subscribed before me, this 14th day of March, A. D. 1921.

W. B. Woods, Prosecuting Attorney, the Municipal Court of Cleveland, O. V. N.

E. L. Hilliard, Deputy Clerk of the Municipal Court of Cleveland."

The jury was impaneled and sworn and A. H. Dilks had taken the stand on behalf of the plaintiff. The defendant objected to the introduction of any testimony under the foregoing affidavit on the ground that the affidavit was insufficient and that the ordinance was unconstitutional.

Terrell, J.

I have in mind the case of a man who was charged with perjury in a trial of a certain case, a record of which will be found in the

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files of the court, wherein it is alleged in an affidavit that he gave false testimony, that he might be within his rights to ask wherein was the testimony false and what testimony did he give and wherein was it false.

The answer could be made that it is all in the record, that a record of it will be found, the court stenographer has a copy of all the testimony given, and other witnesses to show that he falsified in court.

Yet that is only evidence to be introduced. I have some doubts whether this affidavit is sufficient. It appears even counsel for plaintiff has some doubts as to its sufficiency, after due thought. If this affidavit is not sufficient, defendant is not placed in jeopardy, and a new action may be instituted.

Now then looking at this publication. The fact that a publication is issued called "Dearborn Independent," or "Dearborn Independent," or any other "Independent" does not of itself make it objectionable. There seems to be some articles in it, entitled "Navy Operates first Exclusive Hospital Ship." There is nothing in that title that seems objectionable. "Cutting up old Circus Money." There is nothing in that that seems objectionable. "The Gold Star Ship," "Belgium's Indebtedness," "The Peoples' Savings," "Our General and Sister" doing this or that. "Picture of Some Play Grounds; Children Romping at Play," "Jewish Rights Clash with American Rights" Apparently, from comment made heretofore in this case, it seems that the objectionable feature would lie under a title of that kind. "A Strange Job," "Breach of History," "Should a Foreign Woman Be Pitied?" I think it is a little without reason to ask a court to wade through a book like this, to determine if each or any part or any article or item in this paper is such that might be calculated to excite scandal or have a tendency to create a breach of the peace.

Surely those who were charged with punishment of violations of the law and the prosecution of violations, ought to know immediately that part of the publication that is objectionable, and if this is a part of the affidavit if this publication is made part of the affidavit, the motion would lie, I think to strike out all

of it—all at least that by no stretch of the imagination could be considered objectionable, to be within the phrase “calculated to excite scandal or having a tendency to create a breach of the peace.”

So the issue ought to be in good pleading, narrowed down to the real issue that the court will be required to rule upon when objections are made to the introduction of evidence, so the court may be guided in determining what evidence is proper, that the defendants may be apprised now of that which some one else determines by the filing of this affidavit is a violation of this law.

Now I offer these observations which I call “thinking out loud” for the benefit of the parties here; if you have any further comment to make I will hear it. If not I will take the matter under advisement until tomorrow morning; and ask you also to take it under advisement. If the city’s case is not built upon foundation to stand, it is folly to proceed with the structure. Have counsel any further comment to make upon this?

Thereupon adjournment was by the court taken to the hour of 9:00 o’clock the following day, being Tuesday, May 10, 1921, at which time all parties appeared as before and the court proceeded:

I have carefully gone over the matter submitted last evening. The question as to the sufficiency of this affidavit is presented upon the motion to exclude testimony, or objection to the testimony.

I have come to the conclusion that this affidavit is defective, and does not state with sufficient definiteness the crime under the ordinance. That although the copy of the Dearborn Independent is apparently attached to the affidavit, it is not made a part of it. Even in pleadings in a civil case it could not be read in connection with the petition, where the sufficiency of the averments in the petition to state a cause of action was questioned.

I do not see how in a criminal case the exhibit of evidence itself can be considered where the sufficiency of the charge in the affidavit is attacked.

Further, in consideration of the publication itself, there is no

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definite averment in the affidavit of any matters or facts alleged to have been published in their exhibit which would apprise the defendant of that which he is charged with having put in circulation, having a tendency to incite a breach of the peace. A review of this paper shows many articles, some of which might be extremely objectionable to a considerable number of people, among which I see one here that I might comment upon.

It appears apparently on the editorial sheet of this paper, titled "Duly Executed by the Military." It sets forth how several young men were executed by the Crown Forces in Ireland. These boys were slaughtered, in cold blood, for levying war against the Crown Forces; were accused not of warring against their own country, not against the government of their own country chosen by a majority of about ninety per cent. of the fathers of Ireland; but against what they regarded as a foreign invader, and ruthlessly and without reason putting their native men to a firing squad.

Even the high judicial authorities of this foreign invader have declared that a state of war exists between Ireland and England: legally and actually this is undoubtedly the case. Why then were not these captured boys accorded at least the simple status of prisoners of War?

It proceeds further to condemn the government—the British government in slaughtering and putting to death these young men. We may take the stand that millions of Americans of Irish blood and breeding must be Americans and not Irish, nor seek to embroil their adopted country in the troubles of their former home land, and even if there were not a single American of Irish blood in the United States, we could not shut our eyes to such doings in Ireland.

Americans who are not Sinn Feiners or narrow Nationalists in any respect will with difficulty repress a deep sense of disgust and revolt against wanton slaughter that must outrage the elementary feelings of humanity the world over.

Now there is an article that people, or the British government themselves, those who are Englishmen, in fact or by descent, might object to, and might claim that it is indecent, scandalous,

and might claim that it would tend to incite breach of the peace in our own city here between people who are of Irish or English descent.

Yet I can not conceive, although my feelings would be on one side of that question, that that is an indecent article that would tend to incite breach of the peace in this county.

Now I cite this as showing that a considerable number of people might consider it indecent and objectionable on that ground. There is another article in here entitled "Jewish Rights Clash with American Rights." In this article there is set forth in chronological order apparently dating from 1900 and 1899 apparently a history of the efforts of a people--a people who have been oppressed in many countries--to safeguard and secure the rights that we guaranteed to them under the constitution of our country, a constitution that recognizes no race, color or religion.

This sets forth apparently a history of the effort of the Jewish people in this country to safeguard the rights which our constitution guarantees to them.

True, it might be written by a man who is somewhat prejudiced and in some respects may be objectionable to the Jewish people.

Now these two items deal with peoples at large. Which of these two items, even if this publication were connected up, is it claimed by the prosecution here is the one that is objectionable and calculated to incite breach of the peace?

Palpably, counsel for plaintiff in this case would not contend that the editorial article, although objectionable to many people, is the one to which this prosecution is addressed. From the argument and comment made I take it of course that the article pertaining to Jewish rights is the one that the prosecution objects to. But there is not a word in the affidavit itself that apprises the defendant of that which is claimed to be scandalous and circulated to excite scandal and having a tendency to create a breach of the peace.

I do not think this affidavit is sufficient to state a crime under the ordinance. I will sustain the motion, or the objection of the defendant to the evidence."

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**INVALIDITY OF NOTE AND MORTGAGE MADE TO A
FICTITIOUS PERSON.**

Common Pleas Court of Richland County.

**E. D. HOUSTON v. H. S. HETTINGER, JOHN BERRY, AND JACOB
WORST.**

Decided, June, 1921.

Negotiable Instruments—Notes and Mortgage Made to Fictitious Persons for the Purpose of Avoiding Taxation—Not Enforcible, When—Such Instruments Not in Effect Payable to Bearer—Section 8114.

1. A promissory note made payable to the order of a fictitious and non-existing person, when such fact was unknown at the time to the maker of the note, is void.
2. A mortgage given to secure the payment of promissory notes made payable to the order of a fictitious or non-existing person, which fact was unknown at the time to the maker of the notes and mortgage, is void; and in a proceeding to foreclose such a mortgage the court will enter a decree cancelling both the notes and the mortgage.

H. L. McCray, of Ashland, and *W. H. Gifford*, of Mansfield, for plaintiff.

C. H. Workman, of Mansfield, and *George Frye*, of Ashland, and *Geo. A. McGrath*, of Mansfield, for defendants.

C. H. WOOD, J.

The plaintiff brings this action to foreclose a \$5,000 mortgage on the premises of the defendant, Jacob Worst. The evidence discloses the following state of facts:

That the plaintiff E. D. Houston procured the defendants H. S. Hettinger, who was at the time owner of the premises, to execute the notes and mortgage in dispute of one John Berry, a fictitious or non-existing person, for the fraudulent purpose of evading the listing of the notes for taxation.

On April 11, 1919, the plaintiff transferred and assigned the notes and mortgage to himself by using and signing the name of said John Berry, and now claims to be the owner and holder of the same.

It is conceded that neither H. S. Hettlinger or Jacob Worst had any knowledge that Jacob Berry was a fictitious or non-existing person, or that said notes and mortgage were made for a fraudulent purpose in the name of John Berry.

That subsequent to the execution of the notes and mortgages, the defendant Hettlinger sold and transferred the premises to the defendant Jacob Worst who is now the owner of the same. That the defendant Worst, by said deed assumed a \$5,000 mortgage held by John Berry.

What are the rights of the parties under the above state of facts?

What was the legal effect of the mortgage given by Hettlinger to John Berry?

It is a fundamental principle under the law of contracts, that in order to make a valid and binding contract it is necessary that there be parties capable of contracting and that their minds come together on the terms of the contract. A mortgage and note can be construed as nothing more than a contract between the parties whereby the grantee for a consideration agrees to pay to the grantor a certain sum of money.

“It is necessary to the validity of a deed that the grantee should be capable of taking title, a grantee being as necessary to the conveyance of land as a grantor, it follows that a grant to a fictitious person is void, and a patent for land to a fictitious person not in existence carries no title and invests no interest in anyone.” *U. S. v. Sou. Col. Coal & Town Co.*, 18 Fed., 275.

What is true of a deed in this respect is likewise true of a mortgage; a mortgage is a deed.

“A mortgage to a man after his death is void for want of a grantee in *esse*. *Noble County National Bank v. Donda et al*, 7 Ohio Dec. Reprint, 532.

“It is essential to the validity of a mortgage that there should be proper parties as mortgagor and mortgagee. They may be natural or artificial person, but both must be in existence and capable of contracting.” *Cyc.* Vol. 27, page 1041.

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There is an exception to this rule, that where the fictitious name was used by the parties with full knowledge on their part and with out fraud intervening therein the same will be binding on the parties; but the state of facts at bar comes short of this rule, as the grantor, Hettlinger had no knowledge that John Berry was a fictitious person, or that the name of said fictitious person was inserted for a fraudulent purpose.

It is claimed that the notes and mortgage are in effect payable to bearer, under paragraphs 3 and 4 of Section 8114 of the negotiable instrument act.

Paragraph 3: "Where it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable."

In answer to this, Hettlinger had no knowledge that the notes and mortgage were made payable to a fictitious person at the time the same were executed.

Paragraph 4: "Where the name of the payee does not purport to be the name of any person."

Plaintiff must again fail, when we refer to the notes and mortgage. We find the name of John Berry purporting to be a real person.

The court held in the case of *Armstrong v. Bank*, 46 O. S., 612,

"The rule that a negotiable instrument made payable to a fictitious person or order, is in effect, an instrument payable to bearer, applies only where it is made with the knowledge of the party making it and does not apply where the maker, supposing the payee to be a real person, and intending payment to be made to such person or order, is induced by the fraud of another to so draw it."

The mortgage in question being security for the notes only, must not only fail by reason of its own defects, but the defects of the notes as well.

We do not think the mortgage from Hettlinger to John Berry a fictitious person, conveyed any title, as Hettlinger had no knowl-

edge of the fiction, and the further reason, the transaction on the part of the plaintiff Houston partakes of fraud and no title thereby passed.

The title to the premises remained in Hettlinger and when he conveyed them to Worst by warranty deed, he conveyed his entire interest therein; and while Worst assumed a certain mortgage thereon he would only be liable to the extent of the validity of the mortgage, and no more.

The case of *David v. City Fire Insurance Company*, 83 N. Y. 268, cited by plaintiff, is instructive on this question, and the holding of the court therein clearly defeats the plaintiffs right of recovery when applied to the facts in this case.

A finding in favor of defendant Worst may be entered in this case, dismissing the petition of plaintiff and a cancellation of the mortgage; leaving the parties to work out their rights in an action at law.

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Fehl vs Board of Education.

PERFORMANCE OF JANITOR SERVICE IN PUBLIC SCHOOL BUILDINGS BY CONTRACT.

Court of Common Pleas of Hamilton County.

DAVID E. FEHL v. BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI.*

Decided June 28, 1920.

Schools—Award of Contract for Janitor Service—Provision of Section 7623 as to Public Competition Not Applicable—Incidental Variations from Specifications do Not Render Such a Contract Invalid, When.

1. In the making of contracts for the convenience and prosperity of the schools under their control, boards of education are limited only by the provisions of Section 7623, G. C., as to public competition.
2. A contract for the cleaning and performance of janitor service in public school buildings is not within contemplation of Section 7623, and may therefore be entered into by a board of education without advertisement for public bidding.
3. A contract for such service in a large number of school buildings is not rendered invalid by awarding the work in all the buildings to a single contractor, notwithstanding the specifications on file used the word contractor in the plural and also incidentally required that he be in attendance at each school building from 7 a. m. till 6 p. m.

Saml. L. Hagans, and James B. Swing, for plaintiff.

Harry R. Weber, Asst. City Solicitor, and C. J. McDiarmid, for defendant.

MATTHEWS, J.

The plaintiff suing as a tax payer seeks to have the defendant enjoined from carrying out a contract which it has entered into with James M. Sprague, for school janitor service.

The evidence discloses that the defendant advertised for sealed proposals for cleaning and operating about 80 school buildings, in accordance with certain specifications on file in its office. Sealed proposals were submitted by various bidders for cleaning and operating specific school buildings. The pro-

* Error not prosecuted.

posal of James M. Sprague was to clean and operate all the school buildings referred to; that proposal was accepted by the board of education, and the contract, the performance of which it is sought to have enjoined in this action, was entered into. Whether the board of education acted wisely, or whether the plan of farming out all the work of cleaning the school buildings to one person will prove satisfactory is a question of policy with which the court has no power to interfere. The court is called upon to decide whether the board of education had the power to make such a contract, whether it proceeded according to law in so doing, and whether the contract so entered into is one the attempted performance of which should be enjoined.

The plaintiff urges two grounds as the basis of the relief which he seeks, and these are, first, that the contract entered into by the defendant with James M. Sprague is not in conformity to the advertisement and specifications, and is therefore illegal and void; second, that independently of compliance with any statutory requirements, the attempted performance of the contract should be enjoined because it appears upon its face to be impossible of performance in accordance with its terms.

The postulates of the first ground urged by the plaintiff are:

(a) That Section 7623 of the General Code prescribing the method of making certain contracts applies.

(b) That the proposal made by James M. Sprague, and the contract entered into by the defendant do not conform to the advertisement and specifications required by said Section 7623.

To determine the validity of the plaintiff's first ground requires, therefore, a consideration of the powers of the board of education to contract, and whether Section 7623 of the General Code limits those powers.

By force of Section 4749, General Code, it is enacted that boards of education shall be bodies politic and corporate and "as such capable of suing and being sued, contracting and being contracted with."

By Section 7620 it is made the duty of boards of education, among other things, to "make all other provisions necessary for

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the convenience and prosperity of the schools within the sub-district.”

By Section 7690, boards of education are given the “management and control of all the public schools of whatever name or character in the district,” and power to “appoint a superintendent of public schools, truant officer and janitors, and fix their salaries * * * and such other employees as it deems necessary.”

By force of these sections of the statutes it is the opinion of the court that boards of education have full power to make all contracts which may be reasonably regarded as “necessary for the convenience and prosperity of the schools,” unless restrained by the terms of Section 7623.

The effect of conferring power to contract upon a board of education is stated in *Kraft v. Board of Education*, 67 N. J. Law Rep., 512. It appears from the statement of facts in that case that the board of education had power to contract for school furniture without public competition. The board appointed a committee and invited proposals in accordance with certain specifications, and in discussing the right of the board of education when not being legally bound thereto, it did invite competitive bidding, the court at page 517 says:

“A municipal body may award a contract independently of the proposals it may have invited, provided the power to do so is exercised *bona fide* and with reasonable discretion, having regard to the public good.”

See also on this subject, *Coward v. Mayor, etc.*, 67 N. J. L., 470.

It is urged, however, that Section 7623 prescribes the manner in which a board of education should proceed in such a transaction as that now under consideration. That Section provides:

“When a board of education determines to build, repair, enlarge or furnish a school house or school houses, or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts \$1,500, and in other districts \$500, except in cases of urgent necessity or for the secur-

ity and protection of school property, it must proceed as follows, etc."

It seems to the court that this section is clear and does not require construction. It clearly does not apply to all contracts that a board of education might enter into; by its terms it only applies to such contracts as a board of education may enter into when it determines "to build, repair, enlarge or furnish a school house or school houses, or make any improvement or repair provided for in this chapter."

That it does not apply to all classes of contracts or to any class other than that to which it is limited by its express terms, was decided in the case of *Gosline v. Toledo Board of Education*, 11 C. C. (N. S.), 195. Section 7623 of the General Code was Section 3988 of the Revised Statute. In *Gosline v. Toledo Board of Education* a tax payer sought to enjoin the board of education from entering into a contract for the purchase and sale of 6,000 tons of coal for the use of the schools in the city of Toledo, claiming that among other things, it had not complied with the law by submitting the supplying of the coal to public competition. The points decided as stated in the syllabus, are as follows:

"1. Neither Section 3987, Revised Statutes, specifically empowering boards of education, among other designated things, to provide fuel; nor Section 3988, prescribing for bids for certain designated supplies and contracts, but omitting mention of fuel; nor Section 4017, requiring the director of schools, where one is chosen, to advertise for bids, etc., without providing when or how he shall advertise therefore requires advertising bids for coal or purchase from the lowest responsible bidder.

"2. A broad discretion is reposed in boards of education regarding the purchase of necessary supplies for schools; and in the purchase of fuel, gradation of quality of coal, heating capacity, adaptability to heating apparatus, and experience or skill of janitors and other persons managing school furnaces are essential facts to be considered in making selection therefore, which may render it inadvisable to accept the lowest priced coal offered; and where it appears that the board has complied with the requirement that it act in good faith for the best good of the schools according to the light and understand-

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ing of its members, acceptance of other than the cheapest coal will not be enjoined.

“3. A director of schools is not required, under Sections 3988 and 4017, to go to the expense of advertising for bids for every trivial thing in the way of supplies which may have been ordered by the board to be purchased.”

It seems to the court that a contract providing for the cleaning of school buildings is as clearly not one of those kinds of contract covered by Section 7623 as was the contract for the supplying of the coal with which to heat the school buildings.

In discussing the character of the contract or employment for janitor service, and the powers of the board of education relating thereto, the Court of Appeals in the case of *State ex rel v. Witt*, 3rd Ohio Ap. Rep., 414, at 418, 20 C. C. (N. S.), 529, says:

“A careful examination of the laws relating to the board of education fails to show lack of authority on its part to make and carry out the rules and regulations provided for the care and maintenance of its buildings. Broad powers are given to the board under Section 7620, General Code, to ‘make all other provisions necessary for the convenience and prosperity of the schools.’ The usual limitations as to public letting of contracts by bids seem to be required as to such board only as to matters falling within the terms of Section 7623, General Code, with reference to buildings and repairs. *Gosline v. Toledo Bd. of Ed.*, 11 C. C. (N. S.), 195.”

In the last cited case the court was construing a contract of employment of a janitor for a single school building, the terms and conditions of which were very much like the terms and conditions of the Sprague contract. The court held in that case that for the purpose of the civil service law a janitor should be regarded as an employee, but in the language just quoted the court called attention to the fact that the legal requirements as to public letting of contracts by bids did not apply to it. The fact that the contract in question is for the cleaning of many school buildings instead of one, seems to the court to be a difference in degree and not in kind, and that the same legal principle rules both.

The court is therefore of the opinion that under the express provisions of the General Code giving to boards of education the power to contract and be contracted with, and to make all necessary provisions for the convenience and prosperity of the schools, the defendant had power to enter into the contract for the cleaning of the school houses without submitting the contract to public competition in accordance with Section 7623 referable to other specific classes of contracts.

Assuming that Section 7623 prescribes the method by which the board of education is required to exercise its power in making a contract for the cleaning of public school houses, it still remains a question of fact whether this contract was let in accordance with its terms. The board of education did advertise for sealed bids in accordance with certain specifications on file. It is claimed, however, that the advertisement and specifications properly construed contemplated and required a sealed proposal referable to each separate school house and binding the bidder to be personally present at and in said school house, supervising the cleaning from 7 a. m. until 6 p. m. every day throughout the year, and as much earlier and later without extra compensation, as might be required to insure the proper performance of the work, etc.

The evidence shows that one set of specifications was used for all the school buildings, and in these specifications the buildings were divided into three classes based upon the method by which they were heated, but the specifications generally were applicable to all classes of buildings.

It seems to the court that in the construction of sporadic expressions in these specifications, it must be kept in mind that they apply to not one but approximately 80 school buildings. It is urged that because the word "contractors" is used that that shows that it was contemplated that there should be a separate, individual and different contractor for each school building. In the opinion of the court the use of the term in the plural number can not reasonably be said to have misled bidders. The most that can be said is that by the use of the plural number the board of education contemplated that there might be

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more than one contractor, and not that there must be more than one. To hold otherwise would be placing a more literal construction upon these specifications than is required in the construction of the statutes. By legislative enactment it is provided that where in a statute the plural number is used, it shall be held to include the singular number and *vice versa*.

It is also urged that the specifications require the personal attendance of the contractor in the school building from 7 a. m. until 6 p. m., and that where one contractor is awarded the contract for cleaning all the school buildings he could not perform that provision of the contract, and that that shows it was contemplated that there should be a different contract for each school building, and that bidders were justified in assuming from that provision of the specifications that they were limited to bidding upon the cleaning of one school building only. It seems to the court that that provision in the specifications must be read in conjunction with other provisions. It is provided in the specifications that where the cleaning contractor is absent for any reason and it becomes necessary to employ a substitute, such substitute shall be paid by the cleaning contractor. It is also provided that the cleaning contractor shall keep sufficient help to maintain the building in accordance with the specifications, and that the contractor and assistants must at all times present a clean and neat appearance.

In the advertisement it is provided that the bid must be on blank forms provided by the board of education. Such blank form of bid has not been offered in evidence and the court is not therefore advised of its terms. Presumably, however, the contract entered into conforms to the terms of the bid, and the contract is before the court. In the contract the contractor has agreed to supply a sufficient number of properly skilled helpers satisfactory to the business manager and the board, and the board is authorized upon his failure to prosecute the work in such manner as said business manager of said board deems satisfactory, upon five days written notice to annul and determine the contract, and re-let the work. If the cost of the work under the re-letting exceeds the contract price the

contractor agrees to pay the difference, and if the work cost less the contractor is to be paid the difference. The contractor agrees to give his personal attention to the faithful prosecution of said work and to keep the same under his personal control; and it is also agreed that all disputes or differences which may arise in the construction or in the performance of the contract, shall be submitted to and be determined by the business manager of the board, whose decision shall be final and conclusive upon the contractor, providing the board shall upon the appeal of the contractor within ten days affirm the decision of the business manager.

By all these provisions of the specifications and the contract the board of education reserves to itself the right to pass upon the character and qualifications of the employees of the contractor, so that whether it is the contractor who is present in the school building from 7 a. m. to 6 p. m., or whether it is an employee of said contractor, still such person will, of necessity, and under the terms of this contract, be one whose character and qualifications are approved by the board of education. The element of personal equation between the person in charge of the school building and the board of education is thereby established, and by the application of the principle *qui facit per alium, facit per se*, the cleaning contractor would have performed the provision requiring attendance at the building from 7 a. m. until 6 p. m., and at the same time the guaranty of the board of education of the personal fitness of those who come in contact with pupils and teachers is maintained.

Furthermore, if this contract is to be ruled by the terms of Section 7623 of the General Code, it would be necessary to eliminate altogether the element of personal equation which plaintiff's counsel insists should be preserved, and which the terms of the specifications and contract do preserve. It is provided in that section that "none but the lowest responsible bid shall be accepted," and to bring the contract within the terms of the section it is necessary to place it in the category of contract for building, repairing, enlarging or furnishing a school house, and require the board to accept the lowest bid provided the bidder is responsible, without any investigation

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or consideration of the moral and temperamental fitness of the bidder; and if the contract should be placed upon that plane, then whether the contractor was personally present in a school building, or whether he was there vicariously through an agent, would equally be a performance of that term of the contract, and in neither case would the board of education pass upon the personal qualification of the person coming thereby in close association with teachers and pupils.

The court is of the opinion that even assuming the application of Section 7623, General Code, to the letting of the contract in question, still there has been a substantial compliance with that section. Where a substantial compliance has been made, immaterial omissions and errors will not invalidate the contract entered into. This is the reason behind the language of the court in the case of *State ex rel v. Green*, 18 N. P. (N. S.), 97, at 116.

Second: Lastly it is urged that assuming that the board of education had power to make a contract for the cleaning of all the school buildings by one contractor, and that it proceeded according to law in so letting the contract, that still the attempted performance of the contract with James M. Sprague should be enjoined for the reason that it is impossible of performance and therefore void, and counsel cites and relies upon the rule stated in *Parsons on Contracts*, Vol. 2, page 73, in this language:

“But if one promises to do what can not be done, and the impossibility is not only certain but perfectly obvious to the promisee, as, if the promise were to build a common dwelling house in one day, such a contract must be void for its inherent absurdity.”

The claim that this contract is impossible of performance by James M. Sprague is based upon the provision requiring the cleaning contractor to be in regular attendance at the school building from 7 a. m. until 6 p. m., and it is claimed that this requires the personal attendance of the cleaning contractor, and that inasmuch as the Sprague contract is for the cleaning of approximately 80 school buildings in different localities that necessarily the one contractor could not perform the terms of

that provision. If the court has correctly construed the specifications and the contract, they do not require the personal attendance of the contractor. However, for the purpose of this phase of the case it could be assumed that the terms of the contract themselves are susceptible of that construction and still the result claimed by the plaintiff would not follow. We are now considering the case on the hypothesis that the board of education has the power to enter into this sort of a contract and has done so; therefore if the contracting party proceeds to the performance of this contract in a certain way, and the performance by each is accepted and approved by the other as being in compliance with the terms of the contract, then the parties by their acts have placed a construction upon the contract, which construction will be followed by the courts at least to a limited extent, even as to public contracts in determining the meaning of any doubtful or ambiguous terms. *Kling v. Bordner*, 65 O. S., 86.

Furthermore, if the board of education has power to contract for the cleaning of the school buildings and the method of exercising that power is not circumscribed by any statute, then if any particular term of this contract is impossible of literal performance, the board of education having the power to contract with James M. Sprague for such service as is called for in the contract which is susceptible of performance by him, by continuing the contract and accepting the service it will by implication contract with him according to the service rendered. Where a body corporate has general power to contract it becomes bound by an implied contract to the same extent as it would be bound by an express contract.

For these reasons it is the opinion of the court that the board of education was vested with power to contract for the cleaning of school buildings; that with it was vested the discretion to determine what kind of a contract it should enter into; that the court has no power to control the discretion of the board of education in that regard in the absence of any proof of fraud or collusion, which is expressly disclaimed by the plaintiff in this case, and that therefore the prayer for an injunction should be and is denied, and the petition of the plaintiff dismissed.

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Jones vs Goldfredrick.

OWNERS OF MACHINES IN COLLISION FILE SUITS AGAINST EACH OTHER IN DIFFERENT COUNTIES.

Common Pleas Court of Clark County.

HENRY D. JONES v. HERMAN M. GOLDFREDRICK.

Decided December 22, 1919.

Venue—Actions in Different Counties Between the Same Parties Involving the Same Accident—Pendency of First not a Bar to the Second Until Judgment is Entered.

1. Section 6308, G. C., permits a person injured by the negligence of the owner of a motor vehicle to bring an action in the county where such injured party resides.
2. If two, residing in different counties, are injured in the same accident, the one bringing the action for damages first, in the county in which he resides, can not thereby require the other party to set up in such action not only his defense, but his counter-claim, but each has the right to sue the other in his own county, setting up his own cause of action.
3. "Injured person" includes not only one injured in his person, but also one injured in his property.

GEIGER, J.

The plaintiff alleges that a collision occurred between the car driven by him and that driven by the defendant, while each was operating a car in Franklin county; that the plaintiff's car was damaged by reason of the negligence of the defendant and without fault of the plaintiff, for which he asks damages in the sum of \$459.

The defendant answers, setting up two defenses. The first defense is, in substance, that when the action in Clark county, was instituted, another action instituted prior thereto was pending in Pickaway county between the same parties for the same cause of action, wherein the defendant in this case is plaintiff and the plaintiff is defendant, and wherein the plaintiff claims judgment for injuries caused by the negligence of the defendant therein (plaintiff in this case) in causing the collision; that the defendant (plaintiff herein) filed his answer, and as a defense

alleges that the plaintiff therein (defendant herein) was guilty of negligence, and denying that the accident was caused by his own negligence; that the same testimony and facts relating to the accident will be common to both actions, and that the plaintiff in this action has a legal right to all the relief in said pending action as he prays for in this action, and therefore has no legal right to prosecute this action.

It is claimed by the plaintiff herein that the pending action in Pickaway county is no defense to the action pending here. It is claimed by the defendant herein that inasmuch as the plaintiff may set up by way of cross-petition in a suit in Pickaway county, the matter he now pleads in his petition in the cause in Clark county that the answer that there is a pending suit in Pickaway county involving the same matter is a good defense.

A party may demur on the ground that there is another action pending between the same parties for the same cause. The action in Pickaway county and in Clark county, while they relate to the same accident, are not for the same cause, as each is an action for damages to a different machine, claimed to be caused by a different act of negligence.

It is urged, however, that the rule that when a matter has been finally determined in an action between the same parties by a competent tribunal, the judgment is conclusive, not only as to what was determined, but also as to every other question which might properly have been litigated in the case, is controlling inasmuch as the plaintiff in this case may set up in the Pickaway county case the defense, not only that he was without negligence, but the counterclaim that the accident occurred on account of the negligence of the plaintiff in that case.

Facts that are strictly defensive, and which if pleaded in an action at law will state a good defense, do not constitute a counterclaim. *Rothman v. Engel*, 97 O. S., 77.

See, also, cases cited on page 80, on the proposition that the code requires a defendant to set forth all of his strictly legal defenses to a suit brought against him, or be forever barred from urging one of them in a second suit between the same parties touching the same subject matter.

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The court is of the opinion that the allegation of a pending suit in another county between the same parties, in which the plaintiff in this county may secure the relief he asks for in his petition, is not a good defense to his cause of action, for the reason, among others, that there is no judgment upon the suit pending in Pickaway county.

All the cases cited refer to a situation that arises when the matter has been finally determined in an action between the same parties. The matters have not been finally determined, and it is not certain which suit will first be brought to issue and tried. If on the trial it develops that the matters have been fully determined in either action, it is possible that such fact may be a defense to the other action.

There is another view which seems to the court even more conclusive. Section 6308, General Code, provides that actions for an injury to the person or property caused by the negligence of an owner of a motor vehicle may be brought by the person injured against such owner in the county where such injured person resides.

“Injured person” includes not only one injured in his person, but in his property. The statute was passed for the purpose of affording to a party injured by the negligence of the owner of a motor vehicle, the right to sue not only in the county where the defendant might live or be served, but also the right to bring an action in the county in which the injured party lived.

In an accident between two machines, each machine may be injured and the owners may live in different counties. If the owner first bringing his action in his home county might compel the other owner not only to set up his defense but also his counterclaim in that county, the second owner would be deprived of his right, under this statute, to sue in his own county. Such rule would involve a race between those residing in different counties and involved in a collision, in which each machine was injured, to first invoke the jurisdiction of their respective counties, and thus exclude the other party from the right given him by the statute to bring action in the county in which he resides. This statute necessarily permits different jurisdictions to take

cognizance of the same accident in which several parties are involved, and this can not be avoided by one of the parties requiring the other to set up as a cross-petition his claim in an action first brought in the county where such opponent resides.

Demurrer sustained.

JURISDICTION IN MOTOR VEHICLE NEGLIGENCE CASES.

Common Pleas Court of Clark County.

GEORGE LITTLE V. THE LINDER BROTHERS SANITARY MILK CO.

Decided October Term, 1919.

Venue—Where a Collision Occurs Between Motor Vehicles—The Owners Residing in Different Counties—Corporation May be Served in County Where It Has Its Principal Place of Business—Phrase “Injured Person” Construed.

1. Under Section 6308, G. C., one whose automobile is injured in a collision with a motor truck of a corporation, caused by the negligent acts of its agent within the scope of his employment, may bring an action against such corporation in the county of his residence and have a valid summons issued to and served upon said corporation in another county, where it has its principal place of business.
 2. As a corporation can act only through its agents, the negligence of the agent is the negligence of the owner.
 3. “Injured person” referred to in Section 6308, G. C., is any person injured either in his person or property, which includes any of his property.
- * On the issues joined the case was tried, resulting in a verdict for the plaintiff. Error was prosecuted to the Court of Appeals, where, on February 18, 1920, it was held that the motion to quash was properly overruled, citing *Allen v. Smith*, 84 O. S., 283.

W. W. Witmeyer, for plaintiff.

McMahon & McMahon, Dayton, Ohio, for defendant.

GEIGER, J.

The petition alleges that the defendant is a corporation with its principal place of business at Dayton, Ohio; that the plaintiff

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iff resides in Clark county, Ohio, and was the owner of an automobile; that the defendant was the owner of an auto truck, operating under the control and direction of a servant of the defendant, at the instance and direction of the defendant for the purpose of performing certain corporate duties; that the servant while driving the auto truck within the scope of his employment negligently caused it to collide with the automobile of the plaintiff injuring the same in the particulars set out in the petition, to the plaintiff's damage as claimed.

The petition was filed in Clark county, Ohio, and summons issued to the sheriff of Montgomery county, to be served upon the defendant, which was done.

The defendant filed a motion to quash the service on the ground that the court had no jurisdiction over the defendant, in as much as the defendant was not served with summons in Clark county.

The action is brought in Clark county, and summons issued to Montgomery county under favor of Section 6308, the material part of which is:

“Actions for injury to a person or property, caused by the negligence of the owner of a motor vehicle may be brought, by the person injured, against such owner in the county wherein such injured person resides.”

It is contended by the defendant, in support of its motion, that the petition shows that the injury was not caused by the defendant, and further that the section does not apply where two automobiles collide.

It is claimed that the petition shows that the accident was caused not by the defendant corporation, the owner of the machine, but by the negligent act of a servant of the defendant and that the Legislature did not intend that the owner of an automobile might be sued in the county where the injured party resides when the injury was caused not by the owner but by the owner's servant, it being urged that the corporation, as owner, was not negligent in operating the truck at the time of the accident.

The section allows the action to be brought only against the owner of the automobile and only where the negligence of the owner causes the injury. *Allen v. Smith*, 84 O. S., 283.

Whether or not such suit can be brought against an individual owner of an automobile operating the same through his agents or servants, where the negligence is not that of the owner but of his agent, it seems to the court that the case at bar, the owner being a corporation and its only means of operation being through this agent, falls within the provision of the section when it is alleged that the accident was caused by the negligence of a duly authorized agent of the corporation.

It may be that the section is intended to include only an owner who through his negligence injures another, yet where that owner is a corporation, negligence of its agents is its own.

It is urged that the statute contemplates only actions brought for an injury to the person, and that it does not cover injury to property, and it is claimed that this view is supported by the case of *Allen v. Smith, supra*. The court does not so read the case. The "injured person" referred to in the section is any person injured either in his person or property, which includes any of his property.

Motion to quash summons overruled.

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Robinson v. Lamkin, Executor.

VALIDITY OF A DECLARATION OF TRUST.

Superior Court of Cincinnati.

JOHN F. ROBINSON v. HARRY G. LAMKIN ET AL.

Decided November, 1920.

Agreement Between Father and Daughter Affecting the Ownership of Securities—Scope of the Trust Created—Not Executory in Character—Bearing of Previous Adjudication—Adequacy of Consideration—Trust Held Not Testamentary in Character—Marital Rights of Husband—Subsequent Will of Daughter Not Effective Against Provisions of Trust.

1. Where the validity of an instrument, executed by father and daughter, has been upheld against attack on the ground that the daughter was under the complete dominion of the father and did not understand the nature of the instrument she was signing, the doctrine of *res adjudicata* is applicable as to the question of undue influence, and a recital in the decree that the court found it unnecessary to pass upon one of the seven items of the instrument containing a contingency based on survivorship, does not open the door to a second attack on the same ground as the first action but restricted to that particular item.
2. An agreement between father and daughter with reference to stocks acquired by the father but standing in the daughter's name, whereby the father took a life estate with provision for becoming the absolute owner, in the event of the prior death of the daughter without issue, while she was to become the absolute owner for herself and her children in case she outlived her father, is not open to attack on the ground that it is an executory trust.
3. Inadequacy or want of consideration for the establishing of a trust is immaterial, where the trust is voluntary and executed.
4. The contention that the item in controversy establishing a trust is a will, and therefore revocable and invalid, is without force in view of the previous adjudication establishing the irrevocability of the entire instrument, and also by reason of the further fact that while enjoyment by either party of full ownership of the securities covered by the item was postponed until the death of the other, the rights involved vested immediately upon execution of the instrument.
5. A husband acquires by marriage no interest in the separate personal property of his wife, and if by written instrument she provides that the income from stocks acquired by her father but standing in her

name shall go to him for life and full ownership pass to him in case of her prior death without issue which subsequently occurred, her husband, who added nothing to the property either by way of investment or management is without ground for complaint of invasion of his marital rights, and as between the husband and the father equity is with the latter.

6. Item 4 of the agreement under consideration is a complete, executed and valid declaration of a trust contained in an instrument heretofore adjudicated valid as a whole and the provision in favor of the father is enforceable as against a subsequent bequest of the same stock to the husband.

Stephens, Lincoln & Stephens for the plaintiff.

Healy & Ferris for Harry C. Lamkin.

Miller Outcalt, for the Printing and Lithographing Co. and the Playing Card Co.

E. H. & W. B. Turner for W. B. Oglesby Paper Co.

Marx, J.

This suit is brought by John F. Robinson as plaintiff to secure the unconditional ownership of certain valuable shares of stock under Item 4 of a written instrument executed by his deceased daughter, Pearl R. Lamkin, March 3, 1905. The principal defendant is Harry G. Lamkin, the widower of Pearl R. Lamkin.

The stock which the plaintiff seeks to have transferred to him, and which is claimed by the defendant Harry G. Lamkin, as the executor of Pearl R. Lamkin, to be the property of her estate, subject to the admitted life interest of the plaintiff under said agreement, now stands upon the books of the defendant corporations in the name of Pearl R. Lamkin.

The shares of capital stock which the plaintiff seeks to have transferred to him in this case are 508 shares of United States Playing Card Company; 522.43 shares of the first preferred and 381.32 of the second preferred United States Printing & Lithographing Company; and 50 shares of the W. B. Oglesby Paper Company.

Each of these corporations has been made a defendant. However, since each of the defendant corporations have in effect filed answers asking the court to determine the ownership of the above

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named shares of stock and assert no rights on their own account in said stock, the principal parties are John F. Robinson as plaintiff and Harry G. Lamkin as defendant. For convenience the term plaintiff and defendant will be used in this statement of fact and in the course of the opinion as referring to these two principal parties unless otherwise specified.

The issue as to the ownership of the above named shares of stock depends for decision upon the validity of Item 4 of the instrument of March 3, 1905. If Item 4 is valid, then the plaintiff is entitled to the relief prayed for in his petition. If Item 4 is invalid, for any of the reasons alleged by the defendant, then the prayer of the petition must be denied. The question as to the validity of Item 4 is purely a question of law and involves no disputed questions of fact. However, in order that the question of law may be more intelligently understood, a brief statement of the facts is essential.

STATEMENT OF FACTS.

The shares of stock which the plaintiff seeks to have transferred to him in this case represent part of the proceeds of an investment made by the plaintiff in The Russell & Morgan partnership formed January 1, 1867. The plaintiff was one of the four partners in that firm which became a corporation in December, 1883. At that time he received 99 shares of the capital stock of the Russell Morgan Company, each share having a par value of \$1,000. In 1884 the plaintiff transferred 95 shares of this stock to his wife, Caroline F. Robinson in order to protect his family in case anything should happen either to him or his circus. In 1889 Caroline F. Robinson died intestate, leaving as her sole heirs at law the plaintiff and four minor children, John, aged 17 years; Kate, aged 15 years; Pearl R., aged 11 years; and Caroline, aged 8 years. Her estate consisted of the 95 shares of Russell & Morgan stock. The plaintiff's brother, Gilbert N. Robinson, was appointed administrator of this estate. The plaintiff did not claim his distributive share of his wife's estate and on December 5, 1889 the estate of Caroline F. Robinson was settled by the trans-

fer of the 95 shares of stock of Russell & Morgan Company to the plaintiff as guardian of his four minor children. As each of the children became of age, the stock was transferred to them severally in proper proportions on the books of the company. In this manner the plaintiff's daughter Pearl, became the owner of $23\frac{3}{4}$ shares of the stock of the Russell & Morgan Company, which original stock by reason of the purchase of the Russell & Morgan Company by the United States Printing Company and different exchanges of that stock became the stock now standing in the name of Pearl R. Lamkin upon the books of the defendant corporations and involved in this case.

On October 2, 1901, the plaintiff's daughter, Caroline, married Horace Stevens, against her father's wishes. On June 13th, 1903, Caroline Stevens executed a written instrument with respect to her share of the original Russell & Morgan stock similar to the instrument subsequently executed by her sister Pearl R. Lamkin, on March 3, 1905, which is under consideration in this case.

On March 1, 1905, the plaintiff's daughter, Pearl R. married Harry G. Lamkin against her father's wishes, and on March 3, 1905, executed the written instrument of that date concerning her share of the original Russell & Morgan stock which is the subject of this controversy.

In 1908 the plaintiff married a second time against the wishes of his children. Shortly thereafter, Caroline, Pearl R., and John brought suits to set aside and cancel the instruments of June 13, 1903, and March 3, 1905 and for an accounting. The suit brought by John was settled out of court. The suits brought by Caroline and Pearl proceeded to final judgment by which the validity of both instruments was finally established with the exception of Item 4. The validity of Item 4 of the written instruments of June 13, 1903, and March 3, 1905, was not determined because Item 4 provided for the contingency of Caroline or Pearl dying before the plaintiff and without issue, which contingency had not happened when the previous cases were decided, and did not then seem likely to happen. That contingency has now happened

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in the case of Pearl R. Lamkin who died in October, 1918, without issue.

issue.

For a more complete report of the facts and history of the previous cases reference is made to the opinion of Judge Chas. J. Hunt in *Pearl R. Lamkin v. John F. Robinson and Caroline Stevens v. John F. Robinson*, 10 Ohio Nisi Prius (N. S.), 1.; and to the opinion of the Circuit Court reversing the Common Pleas Court in *Pearl R. Lamkin v. John F. Robinson and Caroline Stevens v. John F. Robinson*, 15 Ohio Circuit Court (N. S.), 126, affirmed in *Lamkin v. Robinson and Stevens v. Robinson*, 88 Ohio State, 603.

For the record and arguments in these cases reference is made to the printed Ohio Supreme Court Records and Briefs, 88 O. S., part 36, Cases No. 13759 and 13760. Since the important questions of law which must be decided in this case turn exclusively upon the construction and validity of Item 4 of the instrument of March 3, 1905. that instrument is quoted verbatim, as follows:

“Whereas, I am the owner of certain stocks, to-wit: five hundred and eight (508) shares of the capital stock of the United States Playing Card Comptny evidenced by Certificate No. —.

“Eight hundred and three and three-fourths (803¾) shares of the capital stock of The United States Printing Company, evidenced by Certificate No. — and fifty (50) shares of the W. B. Oglesby Paper Company, evidenced by Certificate No. —, now this agreement is to show:

“That for and in consideration of one dollar and other good and valuable considerations, to me paid, the receipt whereof is hereby acknowledged:

“1. The said John F. Robinson is to have and retain possession of said shares of stock for and during the term of his natural life; and to collect the dividends thereon and apply them to his own use, and he shall never be called upon to account for them to me or my executors or administrators.

“2. He is to vote the said stock at any and all elections of the said companies, respectively: and for this purpose I hereby authorize him, the said John F. Robinson as my true and lawful attorney, with power of substitution and revocation, for me and in my name to vote at any and all meetings or meetings of stock-

holders of said companies with all the powers I should have if personally present.

“3. That with my consent and approval, when in his judgment it is advisable to do so, to sell the said stock and reinvest the proceeds of sale.

“4. In the event of my dying before he does, leaving no issue of my body, then the said trust shall lapse and the said stock is to revert to him; and to carry out this condition I hereby authorize and empower the said United States Playing Card Company and the United States Printing Company and The W. B. Oglesby Paper Company, and the respective officers of each, to transfer the said shares of stock so transferred to me to the said John F. Robinson at his request.

“5. Should I die before my father, leaving issue, his rights hereunder shall continue and at his death the said stock is to become the property of my children or their descendants.

“6. Should my father die before I do, then the said stock is to come into my possession again and become fully my property.

“7. This agreement is to be in effect during the life of my said father—subject, of course, to our right to change the terms at any time we may agree to do so.

“8. In testimony whereof, I have hereunto set my hand in quintuplicate—one copy for myself, one for John F. Robinson, and for each of the said companies, this third day of March, A. D., 1905.

“(Signed) Pearl R. Lamkin.

(Signed)

“Witnesses:

“R. C. Bolt,

“John G. Robinson.”

The plaintiff has always had the physical possession of the certificates of stock referred to in the instrument of March 3, 1905, and still has possession of such certificates. Prior to the execution of said instrument and ever since then, the plaintiff has collected all of the dividends upon said stock and has voted said stock upon all occasions. While the plaintiff has had the possession of the certificates of stock and has collected the dividends and voted said stock, the stock has always stood upon the books of the company in the name of Pearl R. Lamkin, since the settlement of her account in the probate court. Pearl R.

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Lamkin having died without issue of her body prior to the plaintiff, the plaintiff now asks that the certificates of stock be transferred upon the books of the company into his name as provided in Item 4 of the instrument of March 3, 1905, and that his title be quieted as against all claims of Harry G. Lamkin.

Harry G. Lamkin for defense claims to have succeeded to the rights of his wife to said stock as her heir at law. Pearl R. Lamkin left a last will and testament, executed by her on February 1, 1909, which was duly admitted to probate by the probate court of Cook county, Ill., on January 15th, 1919, and Harry G. Lamkin was duly appointed and qualified as executor of said will and is now acting as such. Pearl R. Lamkin provided in said will that after the payment of her debts and the bequest of a diamond cross and ring to her sister, that all the rest, residue and remainder of her property go to Harry G. Lamkin, her husband absolutely and in fee, and annulled and revoked any and all wills previously made.

The defendant, Harry G. Lamkin further claims that Item 4 of the instrument of March 3, 1905, is wholly void because it is executory, without consideration and testamentary in character, and that upon the expiration of the life interest of the plaintiff, the defendant is entitled to the possession and unconditional ownership of the stock in question.

STATEMENT OF LAW.

In the consideration of the instrument of March 3, 1905, we are met at the outset by the fact that this instrument has been the subject of a final judgment by the court of last resort of this state, which has passed upon the circumstances surrounding its execution and its construction with the single exception of the validity of Item 4. It therefore becomes essential to examine the scope and limitations of the judgment of the Circuit Court affirmed by the Supreme Court and reported in *Lamkin against Robinson et al*; and *Stevens against Robinson et al*, 88 O. S., 603.

1. *Scope of Prior Judgment With Respect to Instrument of March 3, 1905.*

In the suit brought by Pearl R. Lamkin on October 10th, 1908, she alleged that her signature to the instrument of March 3, 1905, had been obtained under circumstances which made that instrument invalid. The basis of her claim was that she was under the complete dominion and control of the plaintiff at the time her signature was obtained. She further alleged that the settlement of her account in the probate court and her receipts and signatures thereon had been similarly obtained. She set forth in full the instrument of March 3, 1905, and alleged that she did not know the meaning of that instrument at the time that she signed it. In her petition she prayed that the instrument be "set aside and cancelled" and that her father be compelled to deliver to her the certificates of stock in question and account to her for all of the dividends collected by him on account of said stock. The answer and cross-petition denied these allegations and prayed for an order adjudging the instrument of March 3, 1905, to be valid and binding and also adjudging that the plaintiff be entitled to the possession of the stock and dividends in question during his life and "absolutely" if his daughter died before him leaving no issue of her body.

Voluminous evidence was introduced upon these issues and the court of common pleas held that Pearl R. Lamkin was "the legal and equitable owner and entitled to the possession of the stock in question." The court of common pleas also found, in the language of the judgment entry, that the instrument of March 3, 1905, "*was executed by the plaintiff (Pearl R. Lamkin) without any consideration whatever therefore,*" and that said written instrument dated March 3, 1905, thereupon became invalid both in law and equity. The entry of the court of common pleas concluded in part with these words; "Wherefore it is ordered, adjudged and decreed that the paper writing set forth in the amended petition and dated March 3, 1905, be and the same is hereby set aside and held for naught; that the plaintiff

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recover possession of the stocks aforesaid together with the certificates representing same. * * * (Record 17). The case was then taken up on appeal to the circuit court, which *reversed* the judgment of the common pleas court and entered a judgment, which in so far as material, is quoted verbatim as follows:

“The court finds that the defendant is entitled for the term of his life to the dividends upon the stocks in controversy in this case and set forth in the petition herein, together with the other rights given him by the instrument in writing of March 3, 1905, set forth in the petition, *which instrument the court finds to be valid and subsisting except the right of survivorship provided in Item 4 thereof, which the court finds it unnecessary to pass upon and does not do so; * * ** (Record 61-62). *Wherefore it is considered, adjudged and decreed that the defendant have and he is hereby awarded the right to draw the dividends on said stock during his life and the other rights specified in said instrument of March 3, 1905, except the right of survivorship, which is not decided as aforesaid. * * ** And that subject to the provisions of said instrument of March 3, 1905, the plaintiff (Pearl R. Lamkin) is the owner of said stocks. * * * (Record 62).

This judgment without modification was affirmed by the Supreme Court of Ohio and hence is absolutely conclusive upon all issues litigated in that case and determined by that judgment. It is the *judgment* which was affirmed by the Supreme Court, and *not* the syllabus or opinion of the Circuit Court, expressing its reasons for entering the judgment. However, there is nothing in the syllabus or opinion of the circuit court as reported in *Lamkin v. Robinson*, 15 C. C. (N. S.), 126, which indicates that the court expressed any opinion by inference or otherwise concerning Item 4 which is expressly left open both by the judgment, the opinion, and the syllabus. The reason why the upper courts did not consider it necessary to express an opinion about Item 4 of the instrument is obvious. Item 4 provided for the contingency of the daughter dying before her aged father without issue. That contingency had not occurred

when the previous case was heard, and it did not seem likely that it ever would occur. Remote as the happening of such contingency then seemed, that very contingency has now occurred.

While the contentions with respect to the validity of Item 4 were not determined by the previous judgment, the contentions with respect to the invalidity of the entire document were determined, and determined adversely to the plaintiff in that case. It was claimed there, as it is here, that the signature of Pearl R. Lamkin was obtained while she was under the dominion and control of her father and under such circumstances as to make the instrument itself void or voidable. This court can not again consider that issue. We are bound by the prior judgment which found against such claim and specifically held the instrument to be "*valid and subsisting.*" This court feels bound by that judgment and therefore has not considered any part of the testimony or argument with relation to the circumstances under which Pearl R. Lamkin's signature to the instrument of March 3, 1905, was obtained. This court holds, that that issue is *res ad judicata*, and in conformity with the prior judgment holds that Pearl R. Lamkin signed a valid agreement under lawful circumstances, and that this agreement must be enforced unless any of its terms are invalid. This court further holds that each of the provisions of that agreement has previously been determined to be valid with the single exception of Item 4, and that this item alone is open to attack upon grounds which if sustained would not also destroy the entire instrument. In other words, any allegation which if sustained, would defeat not only Item 4 but the other six items as well, must be considered prejudged because these items have been held valid, and valuable property rights have been and are being exercised under that instrument and that judgment. The court now proceeds to consider Item 4 and such other claims as are made with respect to its invalidity as do not also involve the remainder of the instrument.

2. *Trust Character of Item 4.* It is claimed by the plaintiff

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that the instrument of March 3, 1905, in effect establishes a trust, and that Item 4 is one of the conditions of that trust. In order to properly determine the true character of Item 4, it is necessary to construe the instrument as a whole. The instrument as a whole, provides:

First, that John F. Robinson keep the certificates of stock, collect the dividends and vote the stock during his life just as he had always done prior to March 3, 1905, and as he has done ever since. And,

Second, that upon the death of Pearl R. Lamkin without issue prior to the death of John F. Robinson, he should become the unconditional owner of the stock, but upon her death with issue her children should become the unconditional owners of the stock upon the death of their grand-father John F. Robinson. And,

Third, that upon the death of John F. Robinson prior to the death of his daughter, Pearl R. Lamkin, she should come at once into the complete ownership and possession of the stock.

The instrument also gave the necessary powers of attorney and authority to the corporations concerned to carry out its provisions. It is very clear that this instrument conferred upon John F. Robinson definite and present rights for the remainder of his life, namely the right first, to keep the physical possession of the certificates of stock; second, to collect the dividends thereon and apply them to his own exclusive use without any accounting either to Pearl R. Lamkin or to her executors or administrators; third, to vote the stock at all elections of the respective companies, and, fourth, to act as attorney for Pearl R. Lamkin with power of substitution and revocation at all stockholders meetings. It is equally clear that the above rights not only vested upon the execution of the instrument of March 3, 1905, but continued under that instrument beyond the lifetime of the maker. It is conceded in this case that acting under the instrument of March 3, 1905, John F. Robinson has ever since the death of Pearl R. Lamkin in October, 1918, been exercising his right to hold the certificates of stock, to collect the

dividends, and to vote at elections and other stockholders meetings without any objection upon the part of the executors or heirs of Pearl R. Lamkin. This right to continue to act under the specific authority and direction of the instrument of March 3, 1905, after the death of Pearl R. Lamkin has been expressly adjudicated to be a valid and subsisting right and this adjudication sufficiently disposes of the contention made by the defendant in this case that the instrument under consideration is merely executory.

The difference between an executory and an executed trust is clearly set forth in *Estate of Thomas Smith, Deceased*; 144 Penn. State Reports, 428; in which the court explains in the second syllabus:

“An executory trust, so called, is one in which the limitations are imperfectly declared and the donors intention is expressed in such general terms that something not sufficiently declared is required to be done in order to complete and perfect the trust and to give it effect. When the limitations are fully and perfectly declared, the trust is regarded as executed.”

This clear statement of the law is supported and supplemented in *Neaves v. Scott*, 9 Howard, 196 at page 211 and *Perry on Trusts*, Vol. 1, Section 359. There is no question concerning the completeness of the instrument under consideration. It is definite, precise and complete, not only in the specific directions as to the disposition of the stock in the event; (1) of the father dying before the daughter, (2) of the daughter dying before the father without issue, and (3) of the daughter dying before the father with issue; but it is also complete in giving all of the necessary powers of attorney and requisite authority to the corporations concerned to enable these directions to be carried out. Whatever the rights of the father and daughter were with respect to the stock in question prior to the execution of the instrument of March 3, 1905, such rights upon both sides were definitely and finally determined, settled and concluded by that instrument. The father took certain specific rights in lieu of whatever rights he may have claimed, and forever con-

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cluded any claim upon his part to any greater or additional right in this stock. Specifically stated, he took a life estate with the possibility of acquiring the unconditional ownership of the stock in the one event of his daughter dying before him without issue. On the other hand, his daughter secured to herself the absolute right to the unconditional ownership of this stock upon her father's death before her, and *accrued for her children* the absolute right to the unconditional ownership of this stock should she possess children upon her death prior to that of her father. There was nothing executory about this. It was completely executed. Not one single thing remained to be done in the future and nothing remains to be done now, except to carry out the directions of Item 4 and transfer the stock into the name of John F. Robinson upon the books of the companies unless Item 4 be invalid.

In the opinion of the court, this complete and executed final settlement fixed the rights of John F. Robinson, Pearl R. Lamkin or her *children*, had she died leaving issue, and her husband, as effectively as if the stock had on March 3, 1905, been transferred into the name of a neutral trustee with directions to hold same in trust and to pay the dividends during life to John F. Robinson with remainder to him upon the death of Pearl R. Lamkin prior to her father without issue, but upon the death of John F. Robinson before his daughter to pay the remainder to her, or upon her death with issue prior to the death of her father to pay the remainder to her *children*. No reason is suggested why the conveyance of this stock to a neutral trustee upon the terms of the instrument of March 3, 1905, would have been invalid. Trusts of this character are created and executed daily. There is no difference in law between the validity of a trust created through the instrumentality of a neutral trustee and a trust created by the settlor simply declaring himself to be the trustee and to hold the trust property upon certain terms and conditions as an irrevocable trust. This has been the law since *Ex parte Pye*, 18 Vesey, 140, decided by Lord Eldon in 1811, in which Lord Eldon said:

“It is clear that this court will not assist a volunteer; yet, if the act is completed, though voluntary, the court will act upon it. It has been decided that, upon an agreement to transfer stock, this court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more; and the court will act upon it.”

That doctrine has been followed in a long line of cases including, *Kekewich v. Manning*, 1 De Gex, M. & G., 176; *Jones v. Lock*, L. R., 1 Ch., 25; *Richards v. Delbridge*, L. R., 18 Eq., 11; *Estate of Thomas Smith*, 144 Penn., 428; *Krankel v. Krankel*, 104 Kentucky, 745; *O’Neil v. Greenwood*, 106 Mich., 572; *Locke v. Farmers Loan & Trust Co.*, 140 N. Y., 135; *Martin v. Funk*, 75 N. Y., 134; *In Matter of Totten*, 179 N. Y., 112; *Gerrish v. New Bedford Ins’t for Savings*, 128 Mass., 159.

The principle of the owner declaring himself the trustee is recognized in *Flanders v. Blandy*, 45 O. S., 108, at the bottom of page 116, and also in the syllabus of *Worthington v. Redkey*, 86 O. S., 128.

The fact that Pearl R. Lamkin understood that she was creating a trust is evident from the very fact that in Item 4 she refers to the status of the property under the entire instrument as “*said trust.*” Courts have frequently said that even where the parties do not use the technical words of trustee and trust, that if the purpose and effect of the acts and words of the parties is to create a trust, it will be so declared. In this case it is not necessary to resort to such interpretation or construction, for the creator of the trust has herself called it a trust. In a strict legal sense she could call it nothing else. She held the bare legal title. She separated from the legal title the beneficial interest and declared that she held the legal title for the benefit and use of her father for his life with remainder, to her or her children or to him in accordance with the specific language of the instrument. She did more than simply make this declaration. She served a copy of the declaration of trust upon each of the corporations and her action was irrevocable

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except with the consent of her father. It would have been unnecessary to state in the document that it could be changed in its terms with the joint consent of both Pearl R. Lamkin and her father, except perhaps certain rights would have vested in any children of Pearl R. Lamkin and the companies without such specific provision would not have consented to any change in the instrument of March 3, 1905, affecting the rights of the children. This provision serves to emphasize the irrevocability of the act of Mrs. Lamkin and specifically makes it unchangeable except with the consent of her father. A further fact which brings into relief the complete surrender of the dominion and control of the property by Mrs. Lamkin is that her father held the physical possession of the certificates of stock and *he likewise* was powerless to sell or reinvest such stock without *her consent*. Thus in three distinct ways was Pearl R. Lamkin barred from future dominion or control over the shares of stock in question when she placed her signature to the instrument of March 3, 1905: (1) by her own declaration, (2) by the surrender of the physical possession of the certificates of stock, and (3) by the service of notice of the trust upon the corporations concerned thereby embracing the property itself with the trust character imposed upon the evidences of title.

The language of the Supreme Court of N. Y. in *Locke v. Farmer's Loan and Trust Co.*, 140 N. Y., 135, perfectly sums up the situation in the case at bar. The court said:

“In like manner, as between settlor and beneficiary a transfer to the latter of all income and dividends necessarily transfers the whole beneficial interest and leaves the settlor a holder of the naked legal title on the books of the company as trustee for the beneficial owners. That is the situation in which, by the deed of trust, the settlor put himself and intended to put himself, and his concurrent acts clearly demonstrate that intention.”

3. *The Question of Consideration.* A great deal has been said orally and upon brief with respect to the alleged want or inadequacy of consideration. Under the view taken by the court of the trust character of the instrument of March 3, 1905, the

question of consideration becomes immaterial. It is uniformly held by all of the authorities that a voluntary, but executed, declaration of trust requires no consideration. (See cases cited above). However, if the question of consideration were material, this court is inclined to the view that such consideration existed and that the circuit court necessarily so found in order to reach the judgment entered in the previous case. It is true that the question of consideration as to Item 4 was left open, but it is equally true that if any part of the instrument of March 3, 1905, was supported by sufficient consideration, that same consideration would sufficiently support Item 4. The consideration which supports the instrument as a whole in the opinion of this court was the complete and final settlement of the rights of plaintiff and his daughter and the limitation of their respective rights to the specific terms of the instrument of March 3, 1905.

4. *Testamentary Effect of Item 4.* It is strenuously insisted that Item 4 is invalid because it is in effect a will and as such was subject to revocation. If Item 4 was subject to revocation in the same manner as a will, there can be no question about the fact that it has been revoked by the last will and testament of Pearl R. Lamkin, admitted to probate in Cook county, Ill., leaving all the rest, residue and remainder of her property except a few diamonds to the defendant. The irrevocability of the entire instrument, including Item 4, has been previously discussed in this opinion and has previously been adjudicated except as to Item 4. It has already been determined by final judgment that Items 1, 2, 3, 5, 6 and 7 are irrevocable. It almost inevitably follows that Item 4 is likewise irrevocable. It is true that Item 4 provides what shall be done in case Pearl R. Lamkin dies without issue before her father, but Item 5 provides what shall be done in case Pearl R. Lamkin dies before her father leaving issue *and cuts out all rights of her husband in such event*, and Item 6 provides what shall be done in case Pearl R. Lamkin's father dies before her. Each of these items provides for the contingency of death. Not every provision as

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to the disposition of property upon the death of the owner is a will. The distinguishing feature of a will is that it does not take effect except upon the death of the testator. *Up to the moment of death no rights of any kind pass.* The instrument is *wholly* without effect, and is subject to revocation at any time. In the instant case, while the *enjoyment* of the unconditional ownership of the property was *postponed* until death, the *rights* were *vested* upon the execution of the instrument. This rule is accurately stated in *Robb v. Washington & Jefferson College*, 185 N. Y., 485, in which it is said,

“Doubtless the second trust created by the declaration was not to take effect in possession or enjoyment until the death of the founder,”

but this was by reason of the terms of the instrument itself, not because that instrument was testamentary. The cases are so numerous in support of this doctrine that only a few are cited, and these without comment. *Matter of Diez*, 50 N. Y., 88; *Gilman v. McArdle*, 99 N. Y., 451; *Lewis v. Curnutt*, 130 Iowa, 423; *Ewing v. Jones*, 130 Ind., 247; *Bromley v. Mitchell*, 155 Mass., 509; *Wissel v. Pierson*, 28 C. C., 452; *Nichols v. Emery*, 109 Cal., 323; *Cowley v. Twombly*, 173 Mass., 393, 53 N. W., 886; *Abbott v. Holway*, 72 Me., 298; *Smith v. Baxter*, 62 N. J., Eq., 209, (aff'd. 64 N. J., Eq., 793); *Brown v. Matlocks*, 103 Pa. Sta., 16.

In this connection two Ohio cases must be noticed, the first is the case of *Worthington v. Redky*, 86 O. S., 128. In this case Worthington expected to die and for the specific purpose of circumventing the statute making void a bequest by will to charity within twelve months of death, attempted to make these bequests through the form of a trust instrument. However, Worthington specifically reserved the right to revoke the appointment of his trustee at any time during his life, and also deposited the trust money in the name of the trustee but in trust for Worthington. The Supreme Court held that there was no unconditional and irrevocable parting of dominion by Worthington

under the trust fund, but that instead, to quote from the bottom of page 138,

“he did not intend to let it get beyond the power of recall, and perhaps that he might have the increment of the money while he lived.”

The Supreme Court therefore concluded that the so-called trustee was merely the agent of the donor and that the agency was revoked by death. This case is not an authority in support of the claim that Item 4 is testamentary in character. On the contrary, the Supreme Court in the Worthington case clearly states that where there is a clear and specific declaration of trust, and the settlor accompanies that declaration by completely and irrevocably relinquishing all dominion over the trust property, it will be sustained as a valid trust.

The most recent case is *Patrick v. Parrott*, 92 O. S., 184. The conclusion reached there is extremely persuasive if not conclusive of the case at bar. In that case Parrott made a will leaving his personal property to his wife, and drew deeds conveying his real estate to his children and grand-children. Each deed contained the provision that the same should not be recorded until his death. The will and deeds were given to the notary with directions that the deeds should be,

“safely kept and delivered at the decease of said John Parrott, to his heirs.”

They were placed in the custody of the local bank cashier. Parrott also delivered to the notary the following written instrument:

“My request is, that at my decease the within deeds be given to the parties named.”

Parrott died and the deeds were delivered and recorded. The court held from the facts stated:

“1. No control, dominion or power of revocation was reserved over the real estate by the donor.

“2. The cashier was the agent or trustee for the donees.

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“3. There was a valid and legal delivery, on the part of the donor, of the deeds to the grantees therein named.”

5. *Marital Rights of Husband.* There is no basis in the law of Ohio for the claim that the action of Pearl R. Lamkin in imposing a trust upon the stock in question under the terms of which her husband was deprived of any rights in the stock was a fraud upon his marital rights. Under Item 5, if Pearl had left children the stock would have gone to them and not one share to defendant. The previous judgment held Item 5 valid and that it cut off no legal rights.

Under the law of this state, neither husband or wife has any interest in the personal property of the other during the lifetime of either. Sec. 7998, General Code.

A husband or wife may also enter into an engagement or transaction with other persons which either might if unmarried. Sec. 7999, General Code. Also *Unner, Guardian v. Yaeger*, 15 Weekly Law Bulletin, 265; affirmed 27 Weekly Law Bulletin, 148. There is nothing in the facts to warrant any claim of fraud upon the rights of the husband. It is admitted that the stock involved in this case was originally the property of the plaintiff. It is likewise admitted that he placed it in his wife's name in order to protect his own family against personal or business disaster. In addition it is admitted that he has always managed and controlled the property interest represented by the stock. He personally has voted the stock, and determined any questions with relation to it which have come up before meetings of the stockholders. If his daughter felt that under these circumstances it was for the best interests of herself and her father to confirm the rights which he had always exercised by written instrument, and to make certain that the stock, which was his originally, should go to him upon her death before him without issue, her husband can hardly be heard to complain of any fraud upon his rights. The husband contributed nothing, either by way of original or subsequent investment, or by participation in the management or control of the

property represented by the stock. He acquired by marriage no interest in the separate personal property of his wife and in so far as the equitable considerations of the case are concerned, the court is of the opinion that as between the husband and the father, the equities are with the latter.

For these reasons the court is of the opinion that the instrument of March 3, 1905, is a complete, executed and valid declaration of trust, and that Item 4 is a valid Item of a previously adjudged valid instrument. The language of the instrument is so clear and precise that there is no ambiguity or indefiniteness concerning its interpretation. The court therefore finds the issues and the equities of the case in favor of the plaintiff, and a decree may be entered in accordance with this opinion, awarding to the plaintiff the relief prayed for in his petition against each of the several defendants.

The court has given to this case the utmost consideration, not only because of the large financial interest involved, but because of the importance of the principles of law presented for determination. Acknowledgment is made here of the indebtedness of the court to counsel upon both sides for their industry, learning and ability displayed in the conduct of the case and in the oral and written argument. The painstaking examination of authorities and the sincere effort to aid the court throughout the hearing and discussion of the case, and the distinguished advocacy of the causes of their respective clients by Mr. Chas. H. Stephens, Jr., and Mr. John C. Healy is worthy of the highest traditions of our Bar and is commented upon specially in order that the same may serve as an example and inspiration.

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Grand Lodge v. Grand Lodge.

**THE TWO MASONIC BODIES OF OHIO ARE OF EQUAL
STANDING.**

Common Pleas Court of Franklin County.

**THE MOST WORSHIPFUL NATIONAL GRAND LODGE, ETC., ET AL V.
THE MOST WORSHIPFUL GRAND LODGE, ETC., ET AL.**

Decided, July 19, 1921.

*Fraternal Orders—Masonic Grand Lodge and Masonic National Grand
Lodge, Colored, Enjoined from Interfering with Each Other—Both
Entitled to The Appellation "Free and Accepted Masons."*

The two colored Masonic bodies, operating and functioning in Ohio through various subordinate lodges with large membership and large property holdings, are both lawfully entitled to peaceably continue such operation and functionings as Masonic lodges and to practice the rites and ceremonies of Free and Accepted Masons and exercise the rites of lodges and grand lodges; and the Grand Lodge owes no allegiance to and is not subject to the authority of the National Grand Lodge.

*Franklin Rubrecht and Eugene Carlin, for plaintiff.**W. E. King and L. H. Jones, for defendant.*

R. P. DUNCAN, J.

This is an action brought by plaintiffs in which an injunction is sought enjoining defendants from using the name they now use and from using the name "Masons," and from maintaining Masonic Lodges in Ohio, and praying for such other relief as equity may require.

Defendants by way of cross-petition pray that plaintiffs may be found not to be Free and Accepted Masons, that its lodges may be found to be illegitimate and clandestine, that plaintiffs may be found to have no Masonic relation to defendants, that plaintiffs may be restrained from practising, pretending or claiming the right to practice the rites and ceremonies of Free and Accepted Masons, and from exercising, attempting or pretending to exercise the rights or privileges of a Lodge or Grand Lodge of Free and Accepted Masons; that plaintiffs be restrained from interfering with defendants in the exercise of their rights and privileges of Free and Accepted Masons, and with the property rights and reputation of defendants; and that de-

fendants may be found to be true and legitimate Free and Accepted Masons.

The court has very carefully and with a great deal of interest considered the evidence herein, and the memoranda of counsel filed herein.

The court has carefully considered the claims of the parties hereto in the light of the evidence and the Masonic history cited and referred to. The origin of Free and Accepted Masons, Colored, is clearly shown and traced. The origin of the National Grand Lodge or National Compact, so-called, is clearly shown, it having been established in the year 1847 by certain lodges of Free and Accepted Masons. The origin and organization of the Grand Lodge of Ohio of defendants in the year 1849 is clearly shown and its lineage clearly traced. The secession or withdrawal of said Grand Lodge of Ohio from the National Grand Lodge or National Compact in the year 1868 is clearly shown. It is clearly shown that this secession or withdrawal occurred on account of a difference of opinion which arose as to the propriety of the existence of a National Grand Lodge to which State Grand Lodges were subordinate or acknowledged allegiance, it being claimed on the one hand that said National Grand Lodge was a proper Masonic body to which all State Grand Lodges were subordinate, and on the other hand, that there could not properly be such a body as a National Grand Lodge, and that the State Grand Lodges were the highest Masonic authority and could not be subordinate or acknowledge allegiance to any other higher Masonic authority.

Upon the question as to whether or not in the year 1877 or 1878 the National Grand Lodge ceased to exist and adjourned *sine die*, there is a divergence in the evidence. However, this may be, it clearly appears from the weight of the evidence that there was a hiatus of eleven or twelve years in the operations and functioning of said National Grand Lodge. It clearly appears that in 1889 there was a reorganization of or a resumption of activities on the part of said the National Grand Lodge, since which time said body has actively existed and regularly functioned.

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The court is of the opinion that for the determination of the issues in this case it is unnecessary to definitely determine this question as to the exact action of said National Grand Lodge in 1877 or 1878 in view of the reorganization or resumption of activities on its part in 1889 and its continued existence thereafter. Neither is it necessary for this court to express an opinion as to which existing body is Masonically speaking the purer or has the better claim to exist as a Masonic body by virtue of the original warrant set out.

The court finds the two Masonic bodies in existence in the state of Ohio as corporations not for profit, duly incorporated under the laws of Ohio, and operating and functioning through various subordinate lodges with large memberships and large property holdings.

The court finds that each of the parties is lawfully entitled to peaceably continue its existence, operations and functionings as Masonic Lodges, and in the practice of the rites and ceremonies of Free and Accepted Masons, and the exercise of the rights of Lodges and Grand Lodges; and that each is entitled to the word "Masons" and to the use in its appellation of the words "Free and Accepted Masons"; and that defendants by virtue of secession or withdrawal from the National Grand Lodge owe no allegiance to and are subject to no authority of said National Grand Lodge.

There has been shown no very serious recent interference on the part of either party with the operations or functionings of the other. However, each party is enjoined from in any manner interfering with the lodges or members of the other in the free exercise of their rights, privileges and functionings as Masons and from in any manner interfering with the property or property rights of the other.

The court expresses the hope that these parties may cease their contentions and animosities and in the future live in harmony and Christian fellowship each with the other.

Injunction denied both plaintiff and defendant except as above set out.

The court is of the opinion that since the principal relief

sought is denied each party and each party is enjoined in certain respects, the costs should be equally borne by each party, and it is so ordered.

INJURY FROM THE USE OF STEEL WOOL

Common Pleas Court of Cuyahoga County.

DAISY ROGERS v. THE KRESGE COMPANY.

Decided, March 7, 1921.

Retail Merchants—Without Liability for Injury to Customers from Goods Sold in Original Packages—Where Ordinary Care is Exercised for Protection of Purchasers.

A retail merchant can not be held in damages for injuries received by a purchaser of an article in common use and not recognized by the trade as dangerous, where the article was sold in the original package as it came from the manufacturer, and the only negligence complained of is that it was delivered to him without explanation as to the manner in which it should be used.

On motion to direct a verdict.

Jewell, J.

A motion has been made to arrest the case from the jury, and direct a verdict for the defendant. The evidence establishes the following facts:

On March 7, 1920, plaintiff entered the store owned and conducted by the defendant, and purchased a certain quantity of steel wool. The article was sold in the original package, as it came from the manufacturer. The defendant conducted a large store, known as a 10-cent store, employing more than three hundred clerks. This article was displayed on one of the show tables. It was packed by the manufacturer, and sold in small packages. The plaintiff purchased one of the packages. No inquiry was made by the buyer. The sales lady gave the packages containing the steel wool to the plaintiff, receiving from the plaintiff the price. The package had on it a picture of a girl using steel wool, scouring a pan. The article was purchased to scour pans, and in using it, certain steel particles from the wool penetrated the right hand of the plaintiff, in consequence

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of which she was severely injured. The negligence charged was the failure to warn plaintiff of the dangers incident to its use, and especially in not warning plaintiff to use gloves when using steel wool.

This is a common law action, and the negligence charged consists in selling to a customer an article without informing the customer of the dangers incident to its use. It is such an article as may be found for sale in a 10-cent store. It is used extensively for finishing woodwork and scouring kitchen utensils. More than 250,000 packages were sold by this company in one year. The evidence discloses that the wool is pressed into small pads by the manufacturer, and packed into boxes, or packages, and sold to the defendant in the original package only. It discloses the further fact that some of the pads had been taken from these boxes and placed on the show table. This fact does not change or add to the liability of the defendant. It would only bring to the attention of both parties the nature and characteristics of the article. Steel wool is not a dangerous article. That it may become dangerous is shown by the fact that the plaintiff was injured in using it.

Is it the duty of a retailer, who sells an article in the package as it comes from the manufacturer, to exercise ordinary care to discover whether it is dangerous or not? The distinction between the liability of the manufacturer and the seller is obvious. We are not dealing with an article that is recognized by the trade as dangerous. Many articles in common use are dangerous, unless used with care. The automobile is a very dangerous machine, when placed in charge of an incompetent driver, yet we do not regard it as a dangerous machine. Can a druggist be charged with negligence, when he delivers to a purchaser a bottle of patent medicine, on account of his failure to analyze its contents, or to advise the customer as to the manner in which it should be used? The purchaser received the articles called for. No misrepresentations were made. In fact, no representations were made. The nature, as well as the extent of the business conducted by a large store, prevents an inspection of each package as it comes from the manufacturer. Neither reason nor law demand it. To ask that the

retailer examine each package before delivering it to the buyer would destroy modern business methods. The buyer, when he asks for a certain article, impliedly represents to the seller that he is acquainted with the article, not only its use, but the manner in which it should be used. We have not been referred to any Ohio authorities, but the rule deducible from the authorities of other states is, that the retailer can not be held liable for damages when he delivers to a purchaser an article in common use, as he receives it from the manufacturer, without explaining the manner in which the article should be used.

It follows that the motion to direct a verdict must be sustained.

ALLEGED BREACH OF CONTRACT OF EMPLOYMENT.

Superior Court of Cincinnati.

EDGAR A. LAWS V. THE STORRS-SCHAEFER CO., ETC. *

Decided 1920.

Action by Employee—For Breach by Employer of Contract of Employment—Stipulating that the Services Were to be to the Entire Satisfaction of the Employer—Burden on Employee to Show that Discharge Was for Some Reason Other than the One Claimed.

1. In an action to recover under a contract of employment, terminated by the defendant for the alleged reason that the contract stipulated the services were to be to the entire satisfaction of the employer, whereas in truth and in fact they were not satisfactory, the burden is upon the employee to show that his services were satisfactory and that the defendant did not act in good faith but dismissed him for some reason other than dissatisfaction with the service he was rendering.
2. In case of recovery by plaintiff in such a case, the measure of damage is the difference between the amount the defendant had contracted to pay, less such amount as plaintiff would have earned had he exercised reasonable diligence in seeking other employment.

* Affirmed by the Court of Appeals, 32 O. C. A., 11; motion to require the Court of Appeals to certify its record overruled by the Supreme Court, May 10, 1921.

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CHARGE TO JURY.

GUSWEILER, J.

The plaintiff for his cause of action represents and says that on the 25th day of August, 1914, he and the defendant company entered into a written contract by which the defendant company was to pay plaintiff the sum of \$100 per week until January 1, 1915, and from January 1, 1915, to January 1, 1916, the sum of \$115.38 per week, or at the rate of \$6,000 per annum, and from January 1, 1916, to January 1, 1917, \$134.61 per week, being at the rate of \$7,000 per annum, and from January 1, 1917, to January 1, 1918, \$153.84 per week, being at the rate of \$8,000 per annum. Plaintiff was to devote his entire time and attention to the interest of the business of the defendant which he claims he did, and says that he has performed his part of said agreement fully and in every respect. Plaintiff says that on May 14, 1916, the defendant company wrongfully discharged him but paid him up to May 27, 1916, for which he claims damages as alleged in his petition.

The defendant company for answer, admits the contract on the terms alleged, but claims to have discharged him on May 22, 1916, and to have paid plaintiff to May 27, 1916. The defendant company claims to have been justified in its discharge of plaintiff for the reason that the said contract contained a provision that plaintiff's services were to be rendered to the entire satisfaction of the defendant company, and that his said services were not satisfactory to defendant company. Defendant company contends that plaintiff breached his own contract in refusing to comply with instructions given him by defendant company, and otherwise was at fault under the terms of said agreement. Defendant company claims to have notified plaintiff at various times and to have given him instructions as to his work and requested him to make changes therein, but that plaintiff neglected and refused so to do.

Thus the issue in this case involves an action seeking to recover for an alleged breach of contract. The contract in this case was an agreement in writing, between the plaintiff and the defendant company. Because the rights and responsibilities of the parties are determined by this writing, your pro-

vince and duty in solving the issues is confined to a solution of the controversy within the limits of this writing. It is not your concern or province to pass upon the rights or responsibilities of the parties as between themselves with reference to any general notion or principle of what should have been done, but it is your duty to determine whether or not the principles which the parties declared for themselves were lived up to or violated by one or the other. Hence it is, that at the outset, you must examine what the agreement was between the plaintiff and defendant company, what the agreement meant, because by that agreement the parties fixed their own rights.

The agreement provided for the employment of the plaintiff by the defendant company under certain agreed compensation, changing during various periods. That was the obligation on the one side by the defendant company in this case. On the other side the agreement was by plaintiff in consideration for this compensation to do certain things. He agreed to perform that which is set down in this contract. He agreed to devote his entire time and attention to the interests of the defendant company in designing their patterns and supervising their cutting and manufacturing department, and to devote his entire time and attention to the interest of their business. He also agreed that his services in and about this occupation would be to the satisfaction of the defendant company.

Plaintiff claims that he performed his part of the agreement in every particular. The burden of proof rests upon the plaintiff by a preponderance of the evidence in this case to prove that he performed his part and accomplished by his work a substantial compliance with said contract. If, upon the evidence, you should find that plaintiff has established a substantial compliance a compliance in material respects with his obligation, he would have performed the contract in that respect and be entitled to the compensation under the contract.

Now as to plaintiff's obligation that his services should be to the satisfaction of the defendant company, there is no rule of substantial or material compliance. The obligation upon plaintiff's part under this contract was that his services should

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be satisfactory to the defendant company. The burden of proof rests upon the plaintiff to prove by a preponderance of the evidence in this case, that he not only performed the services as designer and cutter in substantial and material respects as agreed, but also that his services were in truth satisfactory to the defendant company.

You are not concerned with the question as to whether or not plaintiff was a good designer or ranked high or had expert ability as a designer. You have nothing whatever to do with this question for it is not an issue in this case. Nor is it a question for you to determine whether or not plaintiff's services were of such character that they ought to have been satisfactory. Nor whether they would have been satisfactory to other people, nor whether they should have reasonably been considered satisfactory. The obligation under plaintiff's contract was to make his services satisfactory to the defendant company; hence it is that on this issue the burden of proof by a preponderance of the evidence is upon the plaintiff in this case to show and prove by a greater weight of the evidence that at the time he was discharged and his services dispensed with his services were in truth satisfactory to the defendant company.

It is your duty to determine whether there was a genuine dissatisfaction or whether there was, as a matter of fact, a different reason actuating the defendant in discharging the plaintiff.

If the plaintiff was discharged for any other cause not founded upon a genuine dissatisfaction with the services the plaintiff was rendering, then I charge you that the plaintiff is entitled to a verdict.

By the contract between them, the plaintiff agreed to perform his work to the satisfaction of the defendant and if the defendant in good faith was not satisfied with plaintiff's services, then it had the right to terminate plaintiff's contract and your verdict should be for the defendant.

Upon this issue your determination must be based upon the evidence adduced in this case and you will not be permitted

less such amount as he has actually earned during that period or rather less such amount as by reasonable diligence in seeking employment he would have earned, it being the rule that one who claims compensation because deprived of the rights of a contract of employment may not remain idle, but is under obligation to exercise reasonable diligence to find other employment. Thus, if you should find that plaintiff is entitled to recover in this case, his recovery would be that measure of the contract in its terms of compensation, less such amount as he would have earned had he exercised reasonable diligence in seeking employment. Whether that deduction should be the actual amount earned or another amount is, of course, one of the questions of fact for you to determine.

In case of a finding for the plaintiff he would be entitled to interest upon the amounts stipulated to be paid him in the contract, from the time they should have been paid until the first day of this term of court which is the first day of December, 1919, deducting from any such compensation the amount of actual earnings, or the amount that plaintiff would have earned had he employed reasonable diligence in seeking re-employment.

You will be given two forms of verdict, one for the plaintiff and one for the defendant. You may return a verdict if nine or more jurors agree but all the jurors who do agree, nine or more, must sign the verdict. If your verdict be for plaintiff, you will indicate the amount in both words and figures. You will be given the pleadings and exhibits and when you have agreed upon a verdict you are instructed to report to the court.

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Hines v. Carlin Company.

**DEMURRAGE CHARGES ON CARS BUNCHED BY REASON OF
INTENSE COLD AND HEAVY SNOW.**

Court of Common Pleas for Cuyahoga County.

**WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, v. THE
ANTHONY CARLIN COMPANY, A CORPORATION.**

Decided, April 9, 1921.

*Jurisdiction in Matters of Railroad Demurrage—Bunching of Cars by
Reason of Intense Cold and Heavy Snow—Not an Act of God—
Binding Effect of Interstate Commerce Rulings—Character of
Events Falling Within the Class known as Acts of God.*

1. State courts have no authority to exercise jurisdiction over subjects which come primarily within the jurisdiction of the Interstate Commerce Commission.
2. Where the shipment is interstate, and the tariff rules make no provision for additional free time for car detention on account of bunching, resulting from an act of God, the claim of a consignee bound under the "average agreement" rule for demurrage charges, that he is entitled to additional free time by reason of such agreement, is within the exclusive jurisdiction of the Interstate Commerce Commission.
3. The fact alone that the bunching of cars was wholly due to conditions created by heavy snowfall, severe storms and protracted and intensely cold weather, is not sufficient to show that such bunching was the result of an act of God.

*Tolles, Hogsett, Ginn & Morley, for plaintiff.**Henderson, Quail, Siddall & Morgan, for defendant.***KRAMER, J.**

This is an action brought to collect certain demurrage charges which the plaintiff alleges accrued against the defendant, in February, 1918.

The case is submitted upon an agreed statement of facts, excepting that some evidence was taken upon the issue of the amount of the accrued demurrage. The uncontroverted evidence shows that notice was duly mailed to the defendant on the afternoon of Feb. 12th, which was received by it on the morning of Feb. 13th. The demurrage would, therefore, begin to run from Feb. 13th, 1918, as claimed by the plaintiff; so that, if the plaintiff is entitled to recover, he is entitled to recover in the sum of \$1,013.52, with interest.

The agreed statement of facts is as follows:

"It is stipulated by and between counsel for the respective parties, that during the periods involved in this controversy, Walker D. Hines was the duly appointed, qualified and acting Director General of Railroads, and with his predecessor, Wm. G. McAdoo, was in control and possession of the New York, Chicago & St. Louis Railroad Company, since Jan. 1, 1918, pursuant to proclamation of the President, of Dec. 26, 1917, in accordance with an Act of Congress dated Aug. 29, 1917.

"That The Anthony Carlin Company is successor to the Standard Foundry & Manufacturing Company, and also to the foundry business conducted by Anthony Carlin, and as successor has succeeded to all the rights and all the obligations of said the Standard Foundry & Manufacturing Company, and of the said business conducted by Anthony Carlin.

"That the New York, Chicago & St. Louis Railroad Company, prior to federal control, and this plaintiff, since federal control, has from time to time filed with the Interstate Commerce Commission and Public Utilities Commission of Ohio, freight tariffs providing rules and regulations covering car demurrage at all stations on the lines of railroad operated and owned by the New York, Chicago & St. Louis Railroad Company and the plaintiff herein, as required by the laws of the United States and the laws of the state of Ohio.

"That, as provided by law, such tariff charges are and were the only legal charges applicable for the detention of cars; that the tariff in force during the period hereinafter complained of was the New York, Chicago & St. Louis Railroad Company G. F. D. No. 112-J; that the tariff in force and effect in January, 1914, as well as the one above set forth, together with intermediate provided that the consignee might sign a written agreement with the carrier, known as an average agreement; and when so signed, demurrage should be computed in accordance with the provisions of the demurrage tariff then in force and effect, as governed by said average agreement.

"That on or about Jan. 1, 1914, the defendant's predecessor, the Standard Foundry & Manufacturing Company, duly signed the average agreement provided for in said tariff, which agreement was subsequently accepted and approved by the New York, Chicago & St. Louis Railroad Company, and that such average agreement and demurrage tariffs were in full force and effect during the period involved in this controversy.

"That if the plaintiff is entitled to recover in this case, it is

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agreed that the amount thereof is the sum of \$1,013.52, provided the court finds that there was a constructive placement of the cars consigned to the defendant, and the subject of this controversy, on Feb. 12, 1918. It is agreed that if the defendant is indebted to the plaintiff herein, the sum which he is entitled to recover in this case is \$871.38, provided the court finds that there was a constructive placement of these cars in question on February 13, 1918.

“It is further stipulated and agreed that all of said cars referred to in this action, on which demurrage is sought to be recovered by the plaintiff, were bunched in transit or at destination, and were offered by the plaintiff to the defendant in accumulated numbers in excess of daily shipments, but the said bunching did not occur through any act or neglect of any railroad connected with the shipment or moving of said cars, including the New York, Chicago & St. Louis Railroad Company, the same having been caused wholly by conditions created by the heavy snowfall, severe storms and protracted intensely cold weather in the latter part of 1917, and in January and February of 1918, and the confusion and delay of traffic incident thereto, and to the results thereof.

“The demurrage charges herein sued on arose wholly from said bunching of cars, and were not to any degree caused by any failure or negligence of the defendant.

“That the cars for the detention of which the plaintiff's claim arose, all were consigned to and moved to the defendant herein, from points outside the state of Ohio.

“That the jury is hereby waived by counsel for both parties herein, and the issues of fact and law submitted to the court.”

The correctness of the claim of the plaintiff for demurrage, in some amount, is not controverted by the defendant. Its claim is that no demurrage was properly chargeable against it, for the reason that the bunching of cars at its switch, which prevented it from unloading during the time for which this demurrage charge is assessed, was “caused wholly by conditions created by the heavy snowfall, severe storms and protracted, intensely cold weather, in the latter part of 1917, and in January and February of 1918, and the confusion and delay of traffic incident thereto, and to the results thereof.” (See agreed statement of facts).

In support of this contention, defendant relies upon the case

of *Joslin-Schmidt Company v. Baltimore & Ohio Southwestern Railroad Co.*, 25 C. C. (N. S.) 379, decided Feb. 28, 1916. A motion to require the Court of Appeals to certify its record was overruled, May 29, 1916. That case holds:

“Consignees who are bound under the ‘average agreement’ rule for demurrage charges on cars constructively delivered, notwithstanding the ‘bunching’ of such cars, are relieved therefrom where the bunching was not due to the act or neglect of some railroad company, but was wholly due to conditions prevailing during a great flood.”

The agreed statement of facts, upon which the *Joslin-Schmidt* case was submitted, is the same as those stipulated herein, with two exceptions: first, in that case it does not appear whether the shipment was intrastate or interstate; in this, it is stipulated to be interstate. Second, the cause of the bunching was a flood in the Ohio and Miami valley, which the court says “has been many times held to have been ‘an act of God,’ and, in the absence of any stipulation that it was, we are inclined to think the courts in the Ohio and Miami valleys might take judicial notice to that effect.”

In the case at bar, the stipulation is that the bunching was caused “wholly by conditions created by the heavy snowfall, severe storms and protracted, intensely cold weather, in the latter part of 1917, and in January and February of 1918.”

The plaintiff maintains (1) that this court has no jurisdiction to determine the defense so made; that the defense involves an interpretation of the railroad tariffs, and is therefore within the exclusive jurisdiction of the Interstate Commerce Commission; (2) that the bunching herein was not caused by an “Act of God.”

The controlling authorities seem to determine so clearly that a state court has no jurisdiction to pass upon any claim, the validity of which rests upon an interpretation of the tariffs, as to place the question beyond further controversy.

The federal courts say that the purpose of the act to regulate commerce was to secure and preserve uniformity, and the courts

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may not, as a general question, exert authority over subjects which primarily come within the jurisdiction of the commission. *Townes v. Lehigh Valley R. R. Co.*, 240 U. S. 43.

The precise question here presented was passed upon by the Interstate Commerce Commission, in the case of *Davis Sewing Machine Company v. Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company*, 51 I. C. C. Rep. 192, and was determined adversely to the defendant. The Commission expressly rejects the interpretation of the court in the *Joslin-Schmidt* case. The Commission says (p. 192):

“To sustain its contention that the charges resulting from the bunching of the inbound shipments were unlawfully assessed, complainant cites the case of *Joslin-Schmidt Co. v. Railway*, 25 Ohio C. C. (N. S.) 379, decided February 28, 1916, and apparently embodying the settled rule of decision in Ohio. That case involved demurrage charges, under the average agreement, on shipments detained at Cincinnati, Ohio, which had been bunched in transit as a result of the flood of 1913. The court, citing the provision, in connection with straight demurrage, exempting a shipper from charges for detention occasioned by bunching of cars ‘as the result of the act or neglect of any railroad,’ and the further provision that a shipper electing to take advantage of the average agreement should not have the benefit of the exemption, held that only a situation within the terms of the exemption could be affected by the shipper’s waiver under the average agreement. Pointing out that the bunching had been the result not of the act or negligence of the carrier, but of an act of God, the court added:

“‘It would be a harsh rule which would relieve one party on account of ‘an act of God’ and at the same time permit it to penalize the other on account of delay and damage resulting from the same cause.’

“We are unable to adopt the conclusion reached in that case. Under defendant’s essentially similar rules demurrage was and is assessable for detention beyond the free time, except that under the straight demurrage arrangement, provision is made for an extension of the free time in case of bunching of shipments through the fault of the carrier, which concession is waived under an average agreement. The rules make no provision for additional free time for car detention on account of bunching resulting from an act of God. For any departure

from those rules defendant would be guilty of a violation of the act. One of the purposes of the average agreement is, by credits for cars promptly released, to take care of detention caused by bunching and weather interference. *Alan Wood Iron & Steel Co. v. P. R. R. Co.*, 24 I. C. C. 27; *Michigan Mfrs. Association v. P. M. R. R. Co.*, 31 I. C. C. 329; *Castner, Curran & Bullitt v. P. Co.*, 42 I. C. C. 3. It would seem to us a strange principle that would permit a carrier to decline, under the average agreement, responsibility for the bunching of cars by its own act or neglect, and at the same time hold it accountable for bunching resulting from no fault of its own.

"We conclude that the charges for the detention which resulted from the bunching of cars after the flood of 1913, lawfully accrued, and that, complainant having declined or failed to pay them, defendant was within its rights in terminating the average agreement."

In *Swift & Co. v. Hocking Valley R. R. Co.*, 93 O. S. 143, affirmed by the United States Supreme Court, 243 U. S. 281, it was held:

"Where a demurrage rule, named in the tariff filed by an interstate railroad with the interstate commerce commission and published according to law, has been passed upon and approved by the Commission, acting within the scope of its authority, the decision of that tribunal is binding upon the state courts, and the question of the validity of the rule is not open for consideration in an action brought by the railroad company to recover the charges assessed under the rule as to cars engaged in interstate commerce."

The question again came before the Ohio Supreme Court, in the case of *The Cleveland & Western Coal Co. v. Pennsylvania Company*, 97 O. S. 161. The defendant, the Cleveland & Western Coal Company, in that case, admitted the detention of the cars, and the correctness of the claim for demurrage. The defense was that by virtue of Rule 6 of the tariff, providing that "allowances will be made for railroad errors which prevent proper tender or delivery," the demurrage should be suspended.

"It concedes that in a suit for freight or demurrage charges no counterclaim for damages, either for delayed delivery or damage

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to the goods, can be sustained, but it contends that in this case delay in shipment defeats the claim for demurrage.

“The position of the coal company is that it was the duty of the trial court to so construe and apply Rule 6 as to enforce the suspension of the demurrage charges in the manner stated.” (p. 163).

This is precisely the state of facts in the case at bar, except that here, the defendant asks that the demurrage be suspended, not by virtue of any express provision of the tariff, but by an implied provision. This is, that in addition to the enumerated grounds for suspension, demurrage should be suspended when it has accrued as the result of an Act of God.

The syllabus in *Cleveland & Western Coal Co. v. Penn. Co.*, *supra*, is as follows:

“Primary jurisdiction having been conferred on the Interstate Commerce Commission to deal with interstate commerce to the extent and in the manner provided for by acts of Congress, state courts have no right originally to exercise authority over subjects which primarily come within the jurisdiction of the commission.”

The court says (p. 163):

“The shipments involved in this case were interstate shipments, and jurisdiction to determine controversies arising upon such claims as are set forth here, including the duty and power to construe rules, has been conferred upon the Interstate Commerce Commission by Congress. Equality between shippers in all relations with carriers is the object sought to be attained in the legislation regulating shipments, rates and railroads. It seems to be well settled that the commission has exclusive primary jurisdiction in such matters. Uniform rules and uniform construction of rules are essential to secure the objects sought and to prevent the confusion which would result from one rule being held in one jurisdiction and another rule in another jurisdiction. The courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Interstate Commerce Commission. (*Tex. & Pac. Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138, and *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426). Therefore, it having been shown by the agreed statement of facts which was filed

in the case that the claim of the plaintiff of 150 debit days on demurrage account was correct, the courts below were correct in allowing the claim for that amount. The coal company is not without a remedy if it has a legal claim against the railroad company, for the alleged wrongful delays described in its answer, but it must seek its relief in the forum which has been clothed without authority to deal with the subject."

It would appear, then, that the case of *Joslin-Schmidt Co. v B. & O. S. W. R. R. Co.*, *supra*, either must be distinguished as applying only to intrastate shipments, or must be considered as standing alone, and overruled by the subsequent decisions of our Supreme Court.

The court prefers to rest its decision upon the ground that it has no jurisdiction to determine the claim of the defendant herein made.

It does further appear however to the court that, were it considered that an act of God would suspend the running of demurrage, the facts stipulated do not make out a case falling within the principle designated by that term.

The cause of the bunching of the cars here was "conditions created by the heavy snowfall, severe storms, and protracted, intensely cold weather, in the latter part of 1917, and in January and February, 1918." All of the definitions of "act of God" include the element that the character of the event must have been such as not to have been within the contemplation of the parties, and which could not have been foreseen by the exercise of reasonable foresight and prudence. 1 Corpus Juris, 1172 *et seq.*

So far as the facts here appear, the conditions set out might have existed when the shipment was made, and it might reasonably have been expected that they would continue the same during the entire time that the cars would be in transit.

The court is therefore of the opinion that judgment should be entered for the plaintiff in the amount claimed, viz., \$1,013.52, with interest from March 1, 1918, to April 1, 1921.

Judgment for plaintiff for \$1,201.02. Defendant excepts

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Tilney vs Board of Education.

AGREEMENTS FOR THE BENEFIT OF THIRD PERSONS.

Common Pleas Court of Hamilton County.

MARY TILNEY V. THE BOARD OF EDUCATION, ETC. ET AL.

Decided July 12, 1921.

Contractor for Excavation—Agrees With Owner of the Property to Protect Adjoining Lot by Shoring it Up—Agreement Enforcible by Owner of Adjoining Lot.

An agreement based on a valid consideration, entered into by one person with another for the benefit of a third, can be enforced in Ohio by the said third person in his own name.

Sanford Brown, for the demurrer.

Littleford & Ballard, contra.

Heard on demurrer to petition.

DIXON, J.

The plaintiff is the owner of a lot with the improvements thereon, which adjoins on the east certain ground on West Seventh street in the city of Cincinnati, owned by the board of education and upon which it is erecting a building to be used for school purposes.

The petition alleges that the said board of education has entered into a contract for the erection of said school building with the defendant, Diedrich Meinken, and that:

“By the terms of this contract for and in consideration of \$314,321 to be paid by the said board, the said Meinken agreed amongst other things to do all excavating necessary for the cellars and foundations of the aforesaid school building, and agreed to excavate to the depth of eighteen (18) feet immediately along the west line of the aforesaid building belonging to the plaintiff.

Furthermore, by the terms of the said contract, the two parties agreed for the benefit of this plaintiff that amongst the other work which the said Meinken was to do in consideration of the receipt of the aforesaid sum of money, was that he should shore up, underpin and protect the property of this plaintiff against damage by reason of said excavation aforesaid to the depth of eighteen (18) feet.”

It is further claimed by plaintiff that the said Meinken contemplates making an excavation to the depth of eighteen feet adjoining plaintiff's premises, and that the board of education has notified plaintiff to protect her property to a depth of nine feet, and that the defendant, Meinken, threatens to excavate to said depth of eighteen feet without taking any steps, whatsoever, except below a depth of nine feet, to protect the property of the plaintiff, and that by doing so, he will commit a trespass on plaintiff's property and cause her irreparable injury.

In support of the demurrer, it is urged in the first place, that the board of education is without authority to make any contract to protect plaintiff's property against damage from its excavation, except, for such damage as may be caused by an excavation in excess of nine feet below the curb of the street, for the reason that Section 3782 and 3783, General Code, make it the duty of a property owner to protect his own property against damage from an excavation on an adjoining property to a depth of nine feet, and that therefore, any funds used to pay for the cost of such protection would be an unnecessary and unauthorized expenditure of public funds.

If the undertaking of the board of education for the benefit of the plaintiff, as set forth in the contract with Meinken, adds anything to the cost of the work contemplated in the contract and is purely gratuitous on the part of the board of education, this contention would unquestionably have some merit, but until such facts are made to appear, we do not believe that it can or should be inferred that there is no consideration for this provision of the contract, and that the board of education is deliberately wasting the public funds entrusted to its control.

In the second place, it is claimed in support of the demurrer, that where two persons make a contract for the benefit of a third person, in order to enable such third person to sue the promisee, there must have been a legal duty owing to such third person by the promisor, or there must have been some prior right or claim against either of the contracting parties by which the third person has a legal right to enforce the performance of the agreement.

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There will, no doubt, be found numerous authorities to sustain this contention in other jurisdictions, but in Ohio, it is well settled that an agreement made on a valid consideration by one person with another for the benefit of a third, can be enforced by the latter in his own name. See *Emmitt v. Brophy*, 42 Ohio St., 82, and cases cited therein.

For these reasons we believe that the petition states a good cause of action, and the demurrer is therefore overruled.

INVALIDITY OF A MORTGAGE INDUCED BY THREATS.

Common Pleas Court of Montgomery County.

MARY ELIZABETH VAUGHN v. GEORGE V. GEIS.

Decided March 14, 1921.

Mortgage—Executed by a Married Woman in the Hope of Saving Her Husband from Prosecution—Such an Instrument Without Effect Where Procured by Threats.

A mortgage, executed by a wife without consideration on her separate property, may be avoided by her, where procured by threats on the part of the mortgagee to send her husband to the penitentiary on account of the contracting of a fraudulent debt to him.

SNEDIKER, J.

This case is before the court on the merits. On the 24th day of December, 1919, the plaintiff executed and delivered to the defendant a mortgage upon lot 35412 on the plat of the city of Dayton. At the time her husband, who had been engaged, generally speaking, in the automobile business, was being pressed by the defendant for the payment of certain notes, some of which were forgeries. There were some preliminary negotiations looking to a settlement of the differences between the husband and the defendant and threats of prosecution had been made. The plaintiff was in no way interested in any of the business which had to do with the controversy. On the day in

question, Geis with the husband proceeded to the home of the plaintiff and took with him a mortgage partly made up. When they reached plaintiff's home there were other persons in the house, but the transaction of the signing of the mortgage by the plaintiff was had in a room where she with her husband and the defendant only were present.

On consideration of all the testimony we can only find that she did sign the mortgage on the statement of her husband that he would be arrested and prosecuted if it were not signed by her and with at least a visible acquiescence in that statement on the part of Geis, if not an oral declaration by him to the same effect.

We gather further from the testimony that when the wife did sign it, her act was with this impression and under this fear. The property was hers and when she made the mortgage she made it on account of her husband's unlawful financial transactions and not on account of any compensation accruing to herself. There was no consideration other than this. There is evidence to show that the mortgage was not then and there acknowledged. No notary accompanied Geis and the husband to the home of the plaintiff. While this would be such a defect as would prevent a proper record of the mortgage, the instrument itself would still constitute a mortgage in equity between the parties and would be enforceable between them in equity if the circumstances of its execution plead by the plaintiff do not entitle her to avoid it. 10th Ohio, page 415.

This brings us to the claim of the plaintiff as found in her petition:

"This defendant, George V. Geis came to the residence of this plaintiff with a mortgage all filled out on this her property, and demanded of her that she sign the same; that at first she refused to sign said mortgage, there being no consideration therefor; that thereupon this defendant threatened this plaintiff that he would arrest her husband, John W. Vaughn, and that said John W. Vaughn would be forthwith sent to the Ohio State Penitentiary and that such action would be taken at once unless this plaintiff would sign said mortgage giving this defendant such rights against her property as were set out in said mort-

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gage; that as a result of the threats and language used by said Geis this plaintiff was coerced and against her will forced to sign said mortgage; that there was no consideration whatever passing to this plaintiff in any shape, manner or form from this defendant."

In support of these claims of the plaintiff oral evidence has been introduced to the effect of what we have heretofore stated. It has been held in the case of *Martin v. Evans*, 163 Ala., page 657, that:

"It is competent to introduce parole evidence to show that a conveyance was obtained by undue influence or fraud."

If this instrument was made as the plaintiff claims it was, then it was made under duress and its execution was involuntary, for we are entitled to say that it was made under circumstances which prevented the plaintiff from exercising her free will.

In the 182 Mich. at page 141, the Supreme Court of that state say:

"A wife may undoubtedly avoid a contract, otherwise valid, made by reason of the threatened criminal prosecution of her husband."

In the 253 Mo. at page 1, the second syllabus is:

"Threats by a company with which plaintiff's husband had become short in his accounts to send him to the penitentiary if she did not sign a deed of trust on her home to secure the amount of shortage, are sufficient to deprive a wife of her free will and to avoid the instrument."

In the 43 L. R. A., at page 1005, the Supreme Court of Nebraska say:

"A married woman who involuntarily mortgages her separate estate or homestead to secure an individual indebtedness of her husband, may have the lien cancelled in a suit to foreclose the mortgage, where she was induced to execute it by the mortga-

gee's threats to imprison her husband for feloniously disposing of mortgaged chattels."

In the 80 Miss. page 298, the syllabus is:

"When the wife of a defaulting county treasurer is threatened by a district attorney with the prosecution of her husband unless she conveys all her property to the county and refuses, but subsequently while her husband is still living and liable to prosecution conveys a part of her property on a renewal of the application, her deed is void as a result of duress."

In the 116 New York, at page 606, the court of appeals say:

"A wife may avoid a contract induced and obtained by threats of imprisonment of the husband and it is immaterial whether the threat is of lawful or unlawful imprisonment."

In the 88 Wis., at page 188, the first syllabus is:

"A wife may avoid her note made under duress of threats of criminal prosecution of her husband."

In the 28 Utah, at page 120, the fourth syllabus is:

"The rule is that in relation to husband and wife or parent and child, each may avoid a contract induced and obtained by threats of imprisonment of the other, and it is of no consequence whether the threat is of lawful or unlawful imprisonment."

In the 59 Kansas, at page 281, the court say:

"A wife is not bound by a contract induced solely by the threats of parties that in case she fails to enter into the contract they will cause the arrest and imprisonment of her husband."

In the 68 New Hampshire, at page 253, the court go further than to hold that an instrument under these circumstances is merely voidable. They say in the syllabus:

"The promissory note of a married woman given for the purpose of preventing a criminal prosecution against her husband is void."

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In the body of their opinion their language is:

“The note and mortgage given under such circumstances cannot be deemed valid and binding. It was decided in *Armstrong v. Toler*, 11 Wheaton, 258, that if a promise is entirely disconnected with the illegal act and is founded on a new consideration it is not affected by the act although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. In this case, however, the sole consideration for the note was the plaintiff's fear of a criminal prosecution against her husband induced by the representations made by the defendant for the express purpose of obtaining it. It was given in expectation of and for the purpose of preventing such prosecution and is void.”

In the 45 L. R. A., old series, the Supreme Court of Wisconsin say in the first syllabus:

“Threats to arrest a man for embezzlement unless his wife will execute a mortgage is such duress which will avoid the mortgage made by her, if they were sufficient to control her will.”

There is evidence in this case, which we are inclined to accept as being a statement of fact that at the time this mortgage was signed by this plaintiff, she said that she did so sign it under protest. There is no doubt that the defendant contemplated criminal prosecution for it appears that after the signing of this mortgage prosecution was begun against plaintiff's husband and such proceedings were had that he is now confined in the Ohio penitentiary. We cannot conceive of the plaintiff's signature being obtained under any circumstances more calculated to control her will. The next day was Christmas. Her husband had committed a crime. His crime had been discovered and criminal prosecution was threatened. The man who intended to prosecute him accompanied her husband to her home for the purpose of having the instrument signed. Her husband declared that unless it was signed he would be prosecuted and the person in whose favor it was to be made acquiesced in the declaration of the husband.

We cannot here enter into the question of whether or not the

husband did right or wrong, or as to whether or not he was then and there indebted to the defendant either on account of legal or illegal transactions. Our only question is as to our duty with respect to plaintiff avoiding the mortgage.

In view of all the authorities on the subject, which we have been able to find, we are of the opinion that the plaintiff is entitled to have the mortgage so executed cancelled and held for naught.

An entry may be drawn accordingly.

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Snider v. Dierkes.

**NEGLIGENCE OR UNREASONABLE DELAY IN RECISSION
OF A CONTRACT.**

JOHN J. SNIDER, JR., v. JOHN H. DIERKES.

Common Pleas Court of Hamilton County.

Decided, September 16, 1921.

Promissory Note—Executed for Life Insurance—Policies More Expensive than Anticipated and Fail to Incorporate Provision Contracted for—Notice to Solicitor of the Insurance that Note Would Not be Paid.

Whether or not there was unreasonable delay in rescinding a contract induced by false representations is a question for the jury under the evidence and instructions by the court appropriate to the circumstances of the particular case.

Heintz & Heintz, for plaintiff in error.

L. G. Hilpp and *D. W. Davies*, contra.

Error to the Municipal Court of Cincinnati.

DARBY, J.

Dierkes was plaintiff, and Snider defendant in the court below. The action was upon a promissory note for \$264.15. The face of the note shows that it was payable to John W. Fisler, Agent; it was by him endorsed to Dierkes. The defense was that the note was given in consideration of insurance policies in the New York Life Insurance Company, of which Dierkes was General Agent, and that Fisler was a general soliciting agent; that representations were made that the policies would cover accident liability and that the premium would be rated according to the age of the defendant, which was thirty-three years; that when the policies were delivered they were not the ones applied for, and did not contain the disability liability, and instead of being rated at the age of thirty-three years were rated at the age of forty-eight, thereby greatly increasing the premium.

Briefly stated the testimony was that Fisler solicited the application of Snider and then turned it over to Dierkes, who procured the policies issued by the New York Life Insurance Company; that when they were delivered to Snider he was un-

able to pay the cash premium but gave the note payable to Fisler as agent, and that the note was drawn up by Dierkes and handed to Fisler in the presence of Snider and subsequently endorsed by Fisler to Dierkes.

The defendant claimed that several days after the delivery of the policies he discovered that the disability liability was not included in the policies, and that the premium was rated as of the age of forty-eight years; and that within a very short time thereafter he told Fisler that the policies were not what he wanted, and he would not keep them, and would not pay the note; he made this statement, or the substance of it, to Fisler on several occasions thereafter within two or three weeks after the delivery of the policies.

Snider was the keeper of a small grocery and unfamiliar with transactions of this character.

After the endorsement of the note to Dierkes by Fisler, it was put in bank for collection, and a week or so before its maturity notice was sent to Snider of the maturity of the note, and he thereupon went to the office of the insurance company, took the policies with him, delivered them to Dierkes, stated to him they were not the policies he had applied for, that he would not keep them and would not pay the note.

The testimony of Snider as to the rate at which the premium was charged and that he was misled as to the disability clause referred to, was sharply contradicted by Fisler and Dierkes.

At the conclusion of the testimony, and of its own motion, the court instructed the jury to return a verdict for the plaintiff in the following words:

“The court finds that when the plaintiff discovered that the policies were not what he contracted for it was his duty to return or to make an effort to return the policies sooner than he did as shown by the evidence; that it was an unreasonable delay and therefore he can not avail himself of his own fault.”

A verdict was thereupon rendered for the plaintiff for the full amount.

The only question considered by this court is as to whether or not the court below was justified in finding as a matter of

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law that the defendant below did not rescind, or attempt to rescind the contract within a reasonable time. It should be kept in mind that the note was payable to Fisler; that there is no showing of any knowledge on the part of Snider that the note was ever transferred to Dierkes; that Snider thought he was making the contract, or as he puts it, getting the policies through Fisler; that when he claims to have discovered that the policies were not what he applied for, either as to the liability or as to the premium, that he went to Fisler and told him that he did not want the policies and would not pay the note; and it was not until demand was made for the payment of the note by the bank that he had any conversation with Dierkes with reference to surrendering the policies, or the non-payment of the note. Six weeks, or perhaps a little more passed between the time of the discovery by Snider that the policies were not what he applied for and his returning them to Dierkes; but, as stated, in the meantime he had repeatedly stated to Fisler that the policies were not those contracted for, and that he would not pay the note.

This court is of the opinion that under the circumstances of this case it was a question which should have been submitted to the jury, to determine as to whether or not there had been any unreasonable delay in rescinding the contract after the discovery of the alleged fraud.

What is reasonable time within which an act must be done has variously been held to be—question of fact, question of law, and mixed question of law and fact; but the recent tendency of decisions in Ohio is to leave such questions as to the reasonableness of time to the jury under proper instructions.

In *Liability Assur. Corp. v. Roehm*, 99 O. S., 343, the court expressly disapproves of the last clause of the fourth proposition of the syllabus in the case of *Travelers' Insurance Co. v. Myers & Co.*, 62 Ohio St., 529. The syllabus so disapproved reads as follows:

“ ‘Immediate written notice’ in such stipulation means written notice within a reasonable time under the circumstances of the case; and where the facts are not disputed, what is a reasonable time is a question of law.”

The underscored part of the syllabus is disapproved by the Supreme Court in that case, and the court goes on to say that under the peculiar facts stated in the Roehm case, the jury should have been permitted to pass upon the question as to whether or not the conduct of the insured in failing to give the notice called for by the policy was not excused. See page 348. See, also, *Hickman v. Insurance Co.*, 92 O. S., 87.

Further light is thrown upon this question by the fourth syllabus of *Gibbs v. Village of Girard*, 88 O. S., 34, as follows:

“What is ordinary care, what is reasonable safety, and the like, are, in the first instance, usually questions for the determination of the jury under all the evidence and proper instructions by the court appropriate to the particular circumstances of each case and the issues thereof.”

In *Zang v. Adams*, 23 Colo., 408, on page 413 is the following:

“We are of the opinion that the two months intervening between July, 1893, when the fraud was discovered, and October, 1893, when suit was brought, was not such an unreasonable time as to preclude Zang from setting up as a defense, when thus sued upon the note, a want of consideration arising out of the fraud of the company, and no rights of innocent *bona fide* holders were involved.”

See, also, *McCarty v. New York Life Insurance Co.*, 74 Minn., 530, which holds that:

“That, upon the evidence, the question whether the agent made the alleged false representations, and, if so, whether the insured had lost his right of rescission by negligence and unreasonable delay in not sooner discovering the fraud, were for the jury.”

See, also, *Norton v. Gleason*, 61 Vt., 474; *Gridley v. Tobasco Co.*, 71 Mich., 528; *State v. Schaeffer*, 96 O. S., 215-228.

For error in not submitting to the jury the question of the reasonableness of the time and instructing the verdict for the plaintiff, the judgment of the court below will be reversed.

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**JURISDICTION OF MAGISTRATES IN CRIMINAL CASES IN
FRANKLIN COUNTY.**

Common Pleas Court of Franklin County.

HILLOCK V. STATE AND FIVE OTHER CASES.

Decided, May 19, 1920.

Justices of the Peace—Serving in Townships Outside the City of Columbus—Without Authority to Try Offenses Committed in Columbus.

Jurisdiction of justices of the peace over offenses committed within the boundaries of the city of Columbus was by the municipal court act taken away from justices of the peace of townships of Franklin county outside of said city, and a conviction and judgment by one of such justices in a case where the offense was committed within the city limits must be held for naught.

A. H. Johnson, C. C. Pavey and E. J. Schanfarber, for plaintiff in error.

John G. Price, attorney general, and *D. F. Mulhorn*, assistant attorney general, for defendant in error.

ROGERS, J.

The six above cases are before this court on the petitions in error. They involve the same questions, hence will be considered together.

It appears that each of the defendants below (plaintiffs in error) was arrested, tried and convicted before F. C. McVay, justice of the peace of Marion township of this county, for having in possession the plumage of a wild bird other than a game bird, in violation of Section 1408, G. C., as amended (Vol. 108, Part 1, O. L., pp. 577, 586), filed in office of Secretary of State, June 6, 1919.

The defendants were each residents of the city of Columbus, Ohio, and at all times had the plumage of the alleged wild birds alleged to be in their possession within the corporate limits of said city; and at no time did they have such plumage in their possession in Marion township at, prior to, or since the time of the alleged crime. Hence, upon the undisputed facts just stated the defendants each challenged the jurisdiction of the magistrate over the persons of the defendants and the subject matter of the alleged crimes. Their objections to such juris-

diction were severally overruled by the magistrate, to which exceptions were duly taken in each case. Thereupon the parties defendant were tried, convicted and sentenced. A bill of exceptions was taken and error is prosecuted here to the respective judgments. The first question for determination in the course of this proceeding is as to the jurisdiction of the magistrate.

Prior to the constitutional amendments of 1912, effective January 1, 1913, the office of the justice of the peace had been a constitutional office. Since that time it is wholly a creature of statute and by the provisions of Section 1711-1, G. C. (Vol. 103, O. L. 214), it is declared:

“Section 1711-1. That there be and is hereby established in each of the several townships in the several counties of the state of Ohio, except townships in which a court other than a mayor’s court now exists *or may hereafter be created* having jurisdiction of all cases of which justice of the peace have or may have jurisdiction, the office of the justice of the peace.”

Subsequently to the above enactment and prior to the alleged commission of the offense charged against the defendants a municipal court was established for the city of Columbus, of which, of course, the court and parties will take notice. Further, by the act, and amendments and supplements thereto establishing such court, among other things all jurisdiction theretofore conferred upon justices of the peace was conferred upon the municipal court.

By Section 1558-55a of the act amendatory and supplementary of the act establishing a municipal court in the city of Columbus (Vol. 106, O. L., pp. 365, 369) it is provided:

“Sec. 1558-55a. No justice of the peace in any township in Franklin county, other than Montgomery township, or mayor of any village, in any proceeding, whether civil or criminal, in which any warrant, order or arrest, summons, order of attachment or garnishment or other process except subpoena for witnesses, shall have been served upon a citizen or resident of Columbus or a corporation having its principal office in Columbus, shall have jurisdiction, unless such service be actually made by personal service within the township or village in which said proceedings may have been instituted, or in a criminal matter

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unless the offense charged in any warrant or order of arrest shall be alleged to have been committed within said township or village.”

The matter before the magistrate was a criminal matter and it was essential, therefore, to allege and of necessity to prove that the offense charged was committed within said township, to confer upon the magistrate jurisdiction of the subject matter of the offense. No such allegation was made or proof offered. But as conceded in the bill of exceptions, the offense was not committed in the township of Marion nor did the accused persons reside therein. Hence, if this statute is constitutional, and was in force at the time of the alleged crime (facts which are undisputed), the magistrate had no jurisdiction either of the persons accused or of the subject matter.

It appears that under a similar act to the one last above quoted, which is a part of the act creating the municipal court of Cincinnati, it was in effect held that such provision excluded the jurisdiction of magistrates outside of the city of Cincinnati, but within Hamilton county, over crimes committed within the city. The portion of the act referred to is Section 1558-41, G. C. The case in which the question has been decided is *In re Hesse*, 93 O. S., 230. Newman, J., in discussing Section 1558-41, G. C., along with another section not important here, says:

“By force of these provisions the jurisdiction of justices of the peace outside of Cincinnati township, over criminal matters, is limited to offenses committed within their respective townships, while a justice of the peace in Cincinnati township has no jurisdiction whatsoever over criminal matters. There can be no objection to the constitutional validity of these provisions. Although Section 26 of Article II of the Constitution imposes a limitation upon the legislative power in requiring all laws of a general nature to have uniform operation throughout the state, yet it seems to be settled that, Section 1, Article IV, authorizing the establishment of inferior courts, being a special grant of legislative power upon a particular subject, the General Assembly is vested with full power to determine what other courts it will establish, local if deemed proper, either for separate counties or districts, and to define their jurisdiction and power.”

However, it is claimed that since Section 1558-55a was enacted, Section 1448, G. C., has been enacted (Vol. 108, O. L. Part 1, pp. 577, 602), and by implication repeals the former act relative to the exclusive jurisdiction of the municipal court of Columbus over crimes within its territorial boundaries. The Section referred to is as follows:

“A justice of the peace, mayor or police judge shall have final jurisdiction within his county in a prosecution for violation of any provision of the laws relating to the protection, preservation or propagation of birds, fish, game and fur-bearing animals and shall have like jurisdiction in a proceeding for the condemnation and forfeiture of property used in the violation of any such law.”

An examination, however, of the history of the foregoing provision discloses that it is not true that the above provision was passed subsequently to the municipal court act conferring exclusive jurisdiction of offenses committed within the territorial limits of Columbus on such court. The above section as amended was original Section 1468, G. C. (91 O. L., 380, Sec. 75), passed in 1908, and has been in force ever since that date. The only amendment thereto was the additions of the words “fur-bearing animals.” It is fundamental that the effect of an amendment is not to repeal and re-enact the original statute but such statute continues in force from the time of the first enactment, except as to the new provisions which became effective from the time the amended act takes effect. Hence the jurisdiction of magistrates throughout the county in plumage violation cases was in force long prior to the municipal court act above mentioned; and by the latter act the jurisdiction of magistrates in Franklin county, so far as offenses committed within the city of Columbus are concerned, was taken away by the municipal court act, and such magistrates were deprived of the right to exercise any jurisdiction over such crimes. Even if Section 1448 was enacted subsequently, conferring jurisdiction throughout the county upon magistrates of all offenses within the act, still such enactment did not repeal by implication Section 1558-55a. The decision *In re Hesse, supra*, may be cited in support of the last proposition.

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Having reached the conclusion that all power to hear and determine offenses committed within the city of Columbus has been taken away from justices of the peace of the respective townships of the county outside of the boundaries of the city, the magistrate who assumed to try these defendants arrogated to himself an authority which he did not possess; and having no jurisdiction his judgment in each case is absolutely void. The judgments are each accordingly reversed and held for naught.

VALIDITY OF A WAIVER.

CLYDE P. WHITMER V. WILMER C. ARTHUR.

Common Pleas Court of Montgomery Court.

Decided July 7, 1921.

Mechanics Lien—Release of by Those Who Had Furnished Labor or Material—Applicable to Subsequent Claims as well as those then Accrued—Consideration Not Necessary to Relinquishment of a Personal Right.

A waiver of all right of lien by one who has furnished material or labor for a structure of any kind is not open to attack for want of consideration or because procured by a building association for the benefit of the owner of the property as well as in its own behalf; and such a release covers not only all right of lien then existing but any that may thereafter accrue to the party granting the release by reason of his further furnishing material or labor for the same building.

B. H. Pickeral, for plaintiff.

E. J. Weaver, for defendant.

SNEDIKER, J.

In this case the plaintiff sues to recover \$395.36 with interest, on account of work and labor done and material furnished in the construction of a house of the defendant, Wilmer C. Arthur, on Parkwood Drive in this city. The principal contractor on the work was John Weyrich & Company. To secure his claim the plaintiff on the 18th day of February, 1920, filed with the recorder of Montgomery county an affidavit for mechanic's

lien, and, pursuant to the law, within thirty days after such filing he served a copy of it on Arthur, the owner. Upon the property is a mortgage of the Mutual Home & Savings Association, the amount of which is \$7,000. After the work of building the house had proceeded to a certain stage Arthur made application to the building association for the loan represented by this mortgage. Thereupon the building association, as testified to by Mr. Becker, who is its secretary, for an on behalf of itself, and on behalf of Arthur, the owner, required of the head contractor, and among others furnishing labor and material, of this plaintiff a release which is a waiver of the right of lien, and is by the authorities so treated. The money borrowed from the association was intended to be applied in payment of the contract for the construction of the house. The waiver which was signed by this plaintiff reads as follows:

“Release of Lien.

“Dayton, Ohio, August 5, 1919.

“To the Mutual Home & Savings Association,

“For value received we hereby release all right of lien which we now have, or may hereafter acquire, by reason of labor or material furnished or to be furnished by us for plumbing and electrical work on the house and other improvements constructed for Wilmer C. Arthur on Parkwood Drive in Dayton, Ohio, on the following lot of land of which he is the owner, to-wit, lot 40047.

“Clyde P. Whitmar.”

In his answer the defendant, Arthur, claims that by this waiver the plaintiff has released any and all right of lien which he had against the premises belonging to him. We can see no objection to the building association acting on behalf of the owner as well as on its own account in requiring and receiving the waiver. Nor can we see any reason why the owner may not avail himself thereof, although the waiver is expressed as directed to the Mutual Home & Savings Association. Where an agreement is made by one person with another on behalf of and for the benefit of a third, that the third person is not named does not affect his right to profit by the agreement. This is the gen-

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eral law and has been so decided by the Supreme Court of Ohio with respect to contracts, in the 54 O. S., at page 60, 61.

The questions, therefore, with which we ought to concern ourselves are as to the validity of the agreement and as to the force and effect thereof. It may be said in the beginning that the release is not open to construction as to the intention of what was to be expressed by its terms. It is specific. It says "We hereby release all right of lien." It was no doubt because of its definiteness and scope, that the Gebhart-Wuichet Lumber Company, experienced in this sort of thing, changed their waiver of release to read "We hereby release all *priority* of lien."

There must have been, of course, an intention on the part of the plaintiff to do what the waiver so particularly states that it does do. There is not in this case anything to indicate that this act was involuntary.

It has been contended by counsel for plaintiff that no consideration passed, and that, therefore, the waiver is bad. A waiver is an intentional relinquishment of a known right. The right here in question was a statutory right to file a lien.

In 89 N. Y. Supp., 445-451, the court say:

"A waiver is nothing more than the relinquishment of some right which, being personal, requires no consideration for its support. It does not necessarily rest upon the doctrine of estoppel, but results from the agreement between the parties, express or implied."

In the 90 Maryland, p. 136-141, the court, in the opinion, say:

"A waiver, therefore, being merely a voluntary relinquishment of a right, can not be regarded as a contract, and does not require a new consideration to support it. These principles are amply sustained by both the English and American cases."

In 31 Mo. App., the court deciding the case of *Griffith v. Gilum*, lay down the rule that,

"A consideration such as is necessary to support a contract is not necessary to support a waiver."

And in 126 Wisconsin, the Supreme Court, at page 116, in discussing waiver, say:

“It would seem that the more satisfactory ground on which to support the doctrine of waiver is that it is a rule of judicial policy the legal outgrowth of judicial abhorrence, so to speak, of a person’s taking consistent positions and gaining advantages thereby through the aid of courts—a rule by which, regardless of absence of any elements of estoppel or consideration, as those terms are popularly understood, the maxim that one shall not be permitted to blow hot, then with advantage to himself turn and blow cold, within limits sanctioned by long experience as required for the due administration of justice, has been popularly applied.”

So that we are prepared to say that no question can be made as against the waiver before us on account of a lack of consideration. If such a point were made, the circumstances and conditions surrounding the giving of the waiver, its purposes and the benefit to be derived therefrom by not only the building association and the owner, but by the plaintiff himself, furnish ample consideration to support the waiver.

There may be some doubt in the mind of counsel as to whether or not the waiver may be said to extend to work done after it was made and delivered. As bearing upon this the first and second syllabi in the case of *Brown v. Williams and Cloak*, 120 Pa. St., p. 24, furnish us the law:

“A release executed by mechanics or material men during the progress of the construction of a building of all manner of liens, etc., ‘which we or any or either of us now have, or might or could have, on or against said building,’ is an unconditional agreement to look to the personal responsibility of the owner or contractor, and not to the structure. Such a release though made during the progress of the work is operative to discharge the building from mechanic’s lien as effectively as though made after its completion and for labor done and material furnished after as well as before its execution.”

The Supreme Court of Ohio, in the case of the *Iron Company v. Murray*, 38 O. S., p. 323, say:

“The right to a mechanic’s lien for labor and materials furnished for the erection or repair of a building may be waived by an agreement, either express or implied.”

A waiver of the right to file a mechanic’s lien is a waiver

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of a right which contravenes the common law. The provisions of the Code for this purpose are now more severe than formerly. The privilege has been so extended as to make the remedy extraordinary. In order to avail himself of it a subcontractor or material man ought to be required to perform everything which the law provides that he shall do, and, on the other hand, if he voluntarily waives this extraordinary right, the court out of consideration for all parties ought not to hesitate to give such waiver its full force.

The history of the legislation to give subcontractors and material men a direct lien upon the property of the owner is familiar to us. We can still remember the original attempt that was made by the Legislature to so enact, and while we do not now undertake to determine as to the policy of such a law, we are prepared to say that a waiver of rights under it ought, if possible, to be supported.

As is said by one of counsel for the building association, even the moral hazard might be affected by the failure to enforce a waiver so clearly made. It is not a strange thing that the building association undertakes to and does represent the borrower in taking these waivers. The borrower does not generally employ counsel, is not familiar with the mechanic's lien law and really expects the association so to take care of him and all his interests. If it had been the intention of the Mutual Home & Savings Association that this waiver should be simply as to the priority of its mortgage, it would have been easy for it to have made the waiver in that form. The same may be said of the plaintiff.

It is the law that a right to lien once waived may not in the absence of express agreement to that effect with the owner be afterwards revived. This evidence does not show any such express agreement.

On the whole, we are inclined to the opinion that the plaintiff on the 5th day of August, 1919, by his waiver, released any and all right of lien which he then had or thereafter might have, by reason of his connection with the building of this house, and that on that account he is not entitled to recover.

Our finding is for the defendant.

VENUE AND SERVICE IN ACTIONS AGAINST CORPORATIONS,

Common Pleas Court of Franklin County.

FRANK S. MONNETT V. THE GOODYEAR TIRE & RUBBER CO ET AL.

Decided December 23, 1920.

Corporations—Proper Venue in Actions Against—Service Against a Sales Agent not Effective—Upon Whom Service May be Had.

1. The venue of an action against a corporation is the place where the corporation is situated or where its principal office or place of business is found, or where any of the officers named in the statute may be summoned.
2. In actions against corporations other than railroads, service must be had upon some officer who has and exercises corporate power with authority to act for the corporation in its corporate capacity.

F. S. Monnett, for plaintiff.

E. C. Turner and *A. T. Seymour*, for defendants.

KINKEAD, J

Plaintiff as owner of forty-five shares of stock purchased November 1, 1919, files the petition herein for an accounting. It purports to be a representative suit for all stockholders. A prayer is made for a receiver.

The corporate defendant files a motion to quash the service for want of jurisdiction. Coming in for the sole purpose of questioning the jurisdiction it has not entered its appearance as claimed.

Defendant Fred W. Freeman interposes a demurrer claiming that sufficient facts are not stated to show a cause of action against him. That the demurrer is well taken is apparent from an inspection of the petition. The general charge of conspiracy and the meager allegation does not disclose a cause of action against Freeman. The demurrer is therefore sustained.

The service upon the Goodyear Company was made upon R. B. Clark designated in the return as Manager of the company. It recites that the sheriff was unable to find the president, vice-president, secretary or treasurer or other official of higher rank within the county.

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An affidavit is submitted to the effect that defendants principal office and place of business is at Akron, Ohio, where all its corporate business is transacted. It also recites that the company did not maintain a principal office or place of business, or any office or agent in this county; that it maintained only a sales depot in Columbus. The affidavit also alleges that Clark is not an officer, or cashier, treasurer or clerk, or its managing agent.

The question is one of venue. An action must not only be commenced in a proper or legal venue, but the service of summons must be made upon the proper persons designated by statute. With a view to making clear the legal venue in such cases—in actions against corporations—the statute specifically prescribed the legal representatives upon whom service must be made.

Section 11272 requires that actions against corporations shall be brought either:

1. In the county where the corporation is situated.
2. Or where it has or had its principal office or place of business.
3. Or in which such corporation has an office or agent.
4. Or in any county in which a summons may be served upon the president, chairman or president of the board of directors or other chief officer. To bring the corporate entity into court notice must be brought to one of the officers named in the statute clothed with some corporate capacity or power.

Section 11272 is a statute regulating the venue of actions against corporations. Though it names certain corporate officers upon whom summons may be served, the clear purpose is to designate the place where any one of such officers may be served with summons and when the venue of the particular action may be laid.

The venue of the action then is the place where the corporation is situated, or where its principal office or place of business is, or where any of the officers named in the statute may be summoned.

It will be noticed in the four enumerated classes above stated, that the third one is: "Or in which such corporation has an office

or agent." It is doubtful if any one has discovered the purpose and meaning of this language in the light of all the provisions of the statute. It does not appear to have any application to the present case. It does not appear that defendant has an office in this county nor does it have an agent representing it in its corporate capacity.

The sheriff's return designates Clark as a managing agent. But the affidavit submitted on the motion states that defendant's principal office and place of business is at Akron, where all its corporate business is transacted. It states that the company merely maintains a sales agency and that Clark upon whom service was made, was not, as stated in the return a managing agent.

A corporation acts in its corporate capacity only by its corporate officers whose powers are prescribed by its charter or by-laws. A sales agent possesses no corporate powers as such agent. A sales agency is not an "office," representative of corporate powers without specific authority conferred by special by-law.

As stated, the affidavit submitted shows that the person served possessed no managing corporate power. In the absence of a statute like the one applicable to railroads—summons must be served upon the persons named in the statute—which contemplates the summoning of persons who possess and exercise corporate power. When a corporate body is summoned into court to answer in its corporate capacity, only those persons whom the law designates, or whom the general doctrines of corporate law recognize as possessing power and authority to represent and act for the corporation in its corporate capacity should be served with summons in actions brought against the corporation.

The motion to quash the summons is sustained.

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WHEN THE NOTING OF AN EXCEPTION TO AN ORDER OR JUDGMENT IS ESSENTIAL.

Court of Common Pleas of Franklin County.

THE BALDWIN REALTY CO. v. IDA M. SMITH.

Decided, December 1, 1920.

Exceptions—Apply to Decisions Made During Trial or to Judgment Entries Embodying such Decisions—Have no Reference to Rulings on Demurrers—Decisions, Orders and Judgments Distinguished.

Failure to note an exception to an order overruling a demurrer, when no final order is made at the time, does not prevent the defeated plaintiff from prosecuting error to a final order of dismissal subsequently made.

Eagleson & Eagleson, for plaintiff in error.

Doud, Crawfis, Bradford & Dones for defendant in error.

KINKEAD, J.

In the municipal court a demurrer was sustained to plaintiff's petition, to which order no exception was noted. A judgment of dismissal was subsequently entered to which an exception was taken.

The question for decision is whether a failure to note an exception to an order overruling a demurrer, when no final order is made at the time, will prevent the defeated plaintiff from prosecuting error from a final order of dismissal of the cause because of the conclusion of the court that the petition did not state a cause of action.

It is generally believed that the noting of an exception to all orders and judgments is essential.

In the discussion of the question we should keep in mind the distinction between *decision*, *orders*, and *judgment*. Also let us have in mind the difference between trial of causes, and *orders* made upon pleadings. Prior to 1912 there was a distinction between *orders*—there being orders, final *orders*, and judgments.

A *decision* is distinguishable from them all, made by title 9 of the code of 1893. *Decisions*, contemplated by this chapter or

title of the code, are made during trial—and trial definitely means upon the merits—whether to court or to court and jury—*decisions* are also made by the court upon the *pleadings before trial*, but these are evidenced by journal entries placed on the journal—whereas decisions made during trial are not journalized and become a matter of record only by means of a bill of exceptions.

The record of a case taken up on error consists of pleadings, transcript of journal entries, and bill of exceptions. The face of the record, so called, is shown by the pleadings and journal entries. The bill of exceptions is created and provided for the specific purpose of bringing into the record matters occurring during trial, which can only be made part of the record by means of a bill of exceptions signed by the judge.

Decisions by the court may be shown by orders and judgments entered upon the journal. Decisions upon motion or demurrer are made to appear by *orders* placed upon the journal. They appear upon the “face of the record,” and are not brought upon the record by bill of exceptions as are orders and decisions made during trial. There are, however, certain classes of cases which may be tried to the court, equity cases or jury cases where a jury is waived, in which cases the journal or judgment entry may be so prepared and entered upon the record as to make the grounds of the objection appear in the entry.

In the consideration of this question, and of the adjudicated cases, it must be constantly borne in mind that the sole purpose of chapter entitled “4 exceptions” is to provide for taking and preserving exceptions to decisions made during trial.

What is the *record* before the court? It consists of the pleadings and transcript. The record is all here; no bill of exceptions was necessary to bring any part of it here. This court can look at the pleadings and the transcript and see all that was done. There was no trial below, there was nothing but an order and a judgment upon the pleadings. This court can look at the record—the face of the record—without the need of any exceptions, or bill of exceptions, and determine whether the court erred in sustaining the demurrer.

From the early history of procedure under the code it has been

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the rule that no exception need be noted to a final judgment or decree in an action not tried to the jury. That is because the provisions of the chapter on exceptions was intended only to apply to decisions made during trial, or to judgment entries embodying decisions *made* during trial.

In *Bank v. Buckingham*, 12 O. S., 402, a suit in equity, it was held that exception need not be noted to a final judgment in such case in order that it may be reviewed on error.

Scott, J., stated:

“The object of an exception is, generally, to bring upon the record for review a decision of the court upon a matter of law, *which the record* would not otherwise show. In such case the exception must be reduced to writing and allowed and signed by the court.”

Again in *Justice v. Lowe*, 26 O. S., 372, the court held that:

“The sections of the code providing for taking exceptions. have no application to final judgments or orders.”

White, J., stated that the statutory requirement to the taking of an exception,

“Must be understood as applying only to cases in which an exception is required, and as indicating the time at which it must be taken to make it available.”

Judge White refers to *Bank v. Buckingham*, 12 O. S., 402, as clearly showing that the provisions of the code do not apply to final judgments where all alleged errors appear on the face of the record, a bill of exceptions being therefore unnecessary to disclose the alleged error.

The purpose of noting an exception to a *decision*, is to make a record of objections and exceptions to rulings made *during trial*. The objections and exceptions are brought into the record by means of a bill of exceptions signed by the judge.

The significance to be attached to the decisions which hold that exceptions to final judgments are not essential is, that the title or chapter of exceptions was not intended to apply to them for the reason that a certain class of judgments and orders do

not have reference to decisions made during trial. It does not follow, as has been suggested, that an exception must be noted to an order which is not final, such as the sustaining of a demurrer.

Bank v. Buckingham, 12 O. S., 402 (1861), was a decision before the code, in which it was held that it was not essential that an exception be taken to a final judgment at the time of its rendition in order that the same may be reviewed, reversed, vacated or modified.

The statement made at the close of the opinion in *Templeton v. Kraner*, 24, O. S., 565, has reference to a decision during trial, as the preceding language clearly indicates.

It is stated that:

“Numerous other errors are assigned * * * to the decisions and rulings of the court * * * made in the progress of the case; but as it does not appear either in the record, etc., * * * or in the transcript * * * that the plaintiff excepted to any of the rulings or decisions made, except that overruling his demurrer, * * * he must have relied on that alone.

A decision or ruling of the court, not excepted to at the time, can not be assigned for error in a reviewing court, Code, Art., 5, title 9 and title 16, *Geauga Iron Company v. Street*, 19 Ohio 300.”

In *Justice v. Lowe*, 26 O. S., 372, no exception was taken to the final judgment of the district court, the first proposition of the syllabus is as follows:

“1. The sections of the code providing for taking exceptions, have no application to final judgments or orders.”

“Final judgments or *orders*”; the entry sustaining the demurrer in this case was not a judgment; it was an *order*.

White, J., stated in the opinion:

“In support of this claim (that an exception was not taken to the judgment of the district court) cites the case of *Geauga Iron Foundry v. Street*, 19 Ohio, 300; and *Templeton v. Kramer*, 24 Ohio State, 564; but neither of these cases supports the claim. True, in the cause last named, it is said in the opinion, that a decision or ruling of a court not excepted to at the time can not be assigned for error in a reviewing court But this must be

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understood as applying only to cases in which an exception is required, and as indicating the time at which it must be taken, to make it available.

“The same question * * * was decided in * * * *Bank v. Buckingham*, 12 Ohio State, 402, and the opinion of the court in that case clearly shows that the sections of the code providing for taking exceptions have no application to cases like the present.”

In *Frank v. City*, 5 N. P., 520-521, it was stated:

“No exception was taken to this judgment, but as held in 12 O. S., 402, and 26 O. S., 372, on a final judgment it is entirely unnecessary to do so. *When the judgment on its face*, under the laws of which a court takes judicial notice, it is the duty of a reviewing court to correct it.

In *Pope v. City*, 3 C.C., 479, 499, it was stated:

“No exception was taken to this judgment, but as held in 12 Ohio State, 402, and 26 Ohio State, 372, on a final judgment it is entirely unnecessary to do so. *When the judgment on its face*, under the laws of which a court takes judicial notice, is clearly erroneous, it is the duty of a reviewing court to correct it.”

Scott, J., in *Bank v. Buckingham*, 12 O. S., 402, the error being manifested by a final judgment, made clear the distinction between errors apparent upon the “face of the record” and cases where an exception must be entered and a bill of exception taken. He said:

“The object of an exception is, generally, to bring upon the record, for review, a decision of the court upon a matter of law, which the record would not otherwise show. In such cases the exception must be reduced to writing and allowed and signed by the court. But where the decision objected to is entered on the record, and the grounds of objection appear in the entry, and the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts. Code, Section 293. It is provided, by Section 291 of the Code, that the party objecting to the decision must except at the time the decision is made.”

“These provisions of the code are all found in title 9. which treats of and regulates the trial of causes, and they manifestly relate to decisions which are made by the court, upon questions of law which arise during the progress of the trial. Where ob-

jection is made, at the time, to such decisions, all grounds of exception may, perhaps, be obviated, by the action of the other party, or the consideration of the court. *But if the parties acquiesce in the decision, by proceeding in the trial without objection, they are regarded as waiving the right to except.*

“But these provisions of the code do not relate to the final judgment of the court, which, at the close of the trial, definitely fixes the rights of the parties in the action. The judgment is not properly part of the trial, but forms the subject of a distinct title of the code. If the record shows such final judgment to be erroneous, it is the right of the party aggrieved to have it reversed, vacated or modified, on petition in error, * * * To note an exception to a final judgment, in the court which renders it, after the controversy is there ended, would seem utterly futile. The uniform practice * * * has hitherto been in accordance with these views.

The judgment which is sought to be reversed, in this case, is not in the form of an order or decree, but in that of a *finding* by the court, which precedes the formal decree. * * * As it is substantially a judgment of the court upon an issue not made in the case, * * * we think they should be relieved from all embarrassment arising from such an unauthorized finding.”

The significant and controlling purpose of Chapter 4 relating to exceptions—pointed out in *Bank v. Buckingham, supra*, and which is of paramount importance is that—

“*These provisions of the code (found in Chapter 4) treats of and regulates the trial of causes and * * * manifestly relate to decisions which are made by the court, upon questions of law which arise during the progress of the trial.*”

An exception is defined, the time when it is to be taken is fixed, the time within which it must be reduced to writing is fixed, and other essential regulations are made by statute.

The specific purpose, meaning and construction of Section 11563 is essential not only to avoid confusion, but to aid in fully comprehending the general purpose of the chapter and its specific provisions.

It provides that:

“When the *decision* objected to is entered on the record, and

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grounds of objection appear in the entry, the exception may be taken by the party causing it to be noted at the end of the entry that he excepts."

It is to be observed that the whole chapter has to do with, and regulates the taking of an *exception* to a *decision* of the court upon a matter of law.

Provision is made for taking an exception *only* to a *decision*. (11559) The objector to the *decision* must except at the time it is made. (11560) Specific provision is made as to the manner of taking an exception to a charge to a jury. The manner of stating the exception is specified, 11562.

The purpose of Section 11563 is to cover a special finding of facts carried into the journal entry (35 O. S., 113), or when there is an agreed statement of facts.

There is a distinction between a decision and judgment. A decision is the resolution of the principles which determine the controversy.

In *Pipe Line Company v. Fell*, 62 O. S., 543, 555, Spear, J., stated:

"It is true that in an abstract sense there is a shade of difference between the import and the word 'decision' and the word 'judgment.' As expressed by Abbott (Law Dict. 351) the decision is the resolution of the principles which determine the controversy; the judgment is the formal paper applying them to the rights of the parties."

The chapter on Exceptions has given special meaning to the word *decision*, as having reference to decisions made during trial, and regulating the taking and saving of exceptions thereto.

When a court hears and determines a chancery case, or when a jury is waived and the court makes both a finding of fact and a conclusion of law, in such cases the *decision* in the trial of the causes upon matters of fact and law will be entered on the record, and the grounds of objection will appear in the entry.

The specific purpose of Section 11563 seems thus to be made clear, and having to do with decisions made in trial of causes, therefore, has no relation to a decision or ruling upon a demurrer.

We know that the sustaining or overruling of a demurrer without further order is not a final order. When a demurrer to a petition is sustained, an order placed upon the journal sustaining it is not final, and is not reviewable on error until an order of dismissal is made.

An order overruling the demurrer was made in municipal court, no exception being noted; and thereupon a judgment of dismissal was entered to which exception was noted.

Judge Scott in *Bank v. Buckingham, supra*, stated that the provisions regulating the matter of taking exceptions to *decisions* had specific reference to *decisions* made by the court upon questions of law which arise during the progress of the trial, and that the same are all found in title 9 of the code.

One's appreciation of the soundness of this opinion is strengthened by examining the original code, title 9, is entitled: "Trial. Chapter .. Issue 2. 'Trial,'" and that they regulate "Trial by jury," "By the Court," "By Referees," "Exception," "New Trial," etc.

Section 11559, part of section 11560, 11562 and 11563 are in the same language as in the original enactment, so that Judge Scott's interpretation that the same manifestly relate to decisions made during trial, and not to other orders or judgments not part of actual trial, is applicable.

In *Geauga Iron Company v. Street*, 19 Ohio, 300, decided before the code, it was stated in the syllabus that:

"Error can not be assigned upon any ruling of the court in *the progress of a trial*, unless by the bill of exceptions it appears that an exception was taken to such ruling."

It was stated in the opinion (1850) that:

According to our statute, either party may allege an exception to any opinion, order, or judgment of the court, *and is then entitled to a bill of exception*. The judges, if required by such party, must sign and seal the bill during progress of the cause;

"*In the progress of a trial*, if a motion to direct a non-suit be made to the court, it must be decided: and to the decision upon that motion, either party has a right to accept. But to claim any benefit from the right, the party must exercise it, by actually ex-

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cepting to the opinion, and showing that he did so except, by the record. When an objection is made to the introduction of testimony, the court must decide whether it is admissible or not. If either of the parties upon the hearing of the decision, is not satisfied with it, he may except; but if no exception appears upon the record, it will be presumed that none was taken, etc.”

But the sustaining of a demurrer is not a ruling made in the progress of a trial; it is an order made upon the pleadings and is shown by the record of the journal entries or transcript; a bill of exceptions is not essential to place such an order on the record; it appears on the face of the record and is disclosed by a transcript. A bill of exceptions is not essential to bring a ruling on a demurrer to the attention of the reviewing court.

Chapter 4, entitled Exceptions, has relation to the taking of exceptions in the trial and the preparation of bills of exceptions. It has to do with taking exceptions and making them matter of record when the same do not appear on the face of the record. In the preparation of the opinion on this matter we did not go into the matter extensively, but since our good friend—counsel for defendant in error—manifested such interest in the conclusion, we have now discussed the question more fully.

We should study chapter 4 and sections 11559 *et seq.* having to do with “Exceptions.” The scope and purpose of this chapter of the code is to make provision for the taking of exceptions and the preparation of bills of exceptions.

No better leader can be found among the judges than Gholson, J., whose opinion in *Ruffner v. Board*, 1 Disney, 196 (1856), is instructive, in which case he held that:

“The decision of a court overruling a demurrer to the petition, may be assigned for error, although no exception thereto appears in the record.”

He further states:

The decision of the court, in sections 290 and 291, (now 11559, 11560) means a decision upon trial. It does not refer to a decision upon a demurrer, or other decision not occurring upon the trial, or connected with the trial.

He made reference to the former system of practice in respect to the different method of revising errors in courts of law and in courts of equity. In equity there was no such thing as taking an exception to the decision of the court; in law there was no mode of exception known except that by bill of exceptions, the object of which was to bring the supposed error into the record. Where the matter of error appeared on the face of the record, the party prejudiced had the right to avail himself of such error. There were different methods of reviewing cases at law and in equity. But the code provided but one mode.

Judge Gholson said:

“It can not well be doubted that there may be errors on the record, since, as before the code, which a court of error will revise, though no deception be noted. (After referring to the different chapters of the code he further stated). Now, the exceptions referred to (by the code) would appear to be those connected with the trial, either before a court and jury by the court alone, or by referees; and, although a trial, as appears by chapter 1, etc., headed ‘Issue,’ embraces the trial of issues of law and of fact, *yet the issues of law here meant are not those arising on a demurrer to the petition.* They had been provided for by previous sections. The issues here meant, and the trial, have reference to the disposition of the case after the pleadings have been completed, to controvert issues of law and fact.”

“The term ‘exception’ therefore in Section 290 *et seq* of the code, is to be controlled by the application of the rule ‘*noscitur a sociis.*’ The decision of the court, in sections 290 and 291 (11559, 11560) means a decision upon a trial. *It does not refer to a decision upon a demurrer, or other decision not occurring upon a trial, or connected with the trial,* as in the case of an application for a new trial, etc. * * *

“It is scarcely necessary to say, that the only matter to be considered * * * arises on the demurrer of one of the defendants. No exception was noted at the end of the decision. * * * The demurrer of the amended petition should properly have been disposed of by a distinct entry before the final hearing of the case, etc.”

Of course where a party neither objects nor excepts to the overruling of a demurrer to a petition, and answers and goes on to trial, the error is waived. *Davis v. Hines*, 6 O. S., 473.

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Having concluded that this court has jurisdiction of this proceeding in error, we come now to the substantive question of law presented.

Can a corporation which uses a name differing from its legal corporate name maintain an action thereon.

In Thompson on Corporations, Vol. 1, at page 52, Section 50, it is stated that the adoption of a name is designed chiefly for identification and that:

“A contract by a corporation in a name different from its true name may be enforced by either party where no question is raised disputing the identity of the corporation.”

In *Standard D. & D. Company v. Coal & Min Co.*, 146 Ill. App. 144 it was held that:

“In the absence of injury or loss by reason of the use of the name ‘The Globe Distillery’ instead of the ‘Standard Distilling and Distributing Company’ we see no reason for releasing appellants from the force of a contract entered into by it with appellee under the former title. In the *N. W. Distilling Company v. Brant*, 69 Ill., 659, it was held that where a deed was made to a corporation by a name varying from the true one, the corporation might sue in its true name, and aver in the declaration that the defendant made the deed to it by the name mentioned in the deed. See *Phillips v. Int. Book Company*, 26 Penn. App., 230.

In *Gilligan v. Casey*, 205 Mass., 26, 31 *et seq.*, it is stated:

It is well settled that a person or corporation may assume or be known by different names, and contract accordingly, and that contracts entered into will be valid and binding if unaffected by fraud.

The judgment of the Municipal Court is reversed for error in sustaining the demurrer and in dismissing the case.

ERROR TO THE COMMON PLEAS IN CRIMINAL CASES.**SAMUEL STONE V. CITY OF COLUMBUS.**

Decided, May 18, 1921.

Review of Criminal Cases by the Common Pleas—Leave to File Must be Obtained—Prosecutions for Violation of Municipal Ordinances.

1. Section 13751, G. C., provides for the review of certain criminal cases by the common pleas court of convictions in lower courts but does not modify Section 4551, G. C., and when it is sought to prosecute error in a criminal case from the municipal court, under an ordinance, leave of court or a judge thereof must first be obtained from the common pleas court.
2. Prosecutions of error in criminal cases arising under Section 1558-60, G. C., under a municipal ordinance are also controlled in their procedure by Section 4551, G. C., and leave must first be obtained from the common pleas court or a judge thereof, to file a petition in error, and when such leave is not obtained the court, upon motion, will strike the petition in error from the files.

T. H. Hennessey, for plaintiff in error.*Charles A. Leach*, City Solicitor, and *Charles S. Best*, Assistant, for defendant in error.

SOWERS, J.

This case is before the court upon the defendant's motion to strike the petition in error from the files for the reason that it was filed without leave of this court and that the plaintiff in error has not entered into a proper recognizance as required by Section 13759, G. C.

The plaintiff in error was convicted in the court below for the illegal possession of intoxicating liquor and prosecutes error to this court.

This section of the General Code provides that there shall be no suspension in a misdemeanor case until the defendant enters into a recognizance in a sum fixed by the court. It is not contended that this provision of the statute has been complied with, nor is it a matter of any significance in the consideration of this case. The question before the court for determination is whether or not leave of the common pleas court

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must be obtained to file a petition in error in a criminal case where error is prosecuted from the municipal court of Columbus.

Counsel for the plaintiff in error maintains that he has the right to prosecute error to this court from the municipal court under and by virtue of Section 13751, G. C., which among other things provides as follows:

“In a criminal case, including a conviction for a violation of an ordinance of a municipal corporation, the judgment or final order of the court or officer inferior to the common pleas court may be reviewed in the common pleas court,” etc.

This section of the statute simply provides that in a criminal case, including a conviction for the violation of a criminal ordinance, that error may be prosecuted to the common pleas court from a court or officer inferior to the common pleas court. It is not disputed that this right exists, but counsel contend that this provision of our code permits the filing of a petition in error in the common pleas court without leave of court having been first obtained, and in support of this view cites the case of *Creadon v. State*, 24 C. C. (N. S.), page 264, wherein the court holds that:

“It is not necessary to obtain leave to file a petition in error in common pleas court to review a judgment of a police court in a criminal case.”

The judges of this court base their opinion under the construction of Section 13751, G. C., formerly 7356, R. S., and subsequent sections and apply it to a conviction under a statute of the state. The court is correct in saying that the subsequent sections provide for the mode of procedure in prosecuting error authorized by this section, and that this section, unless modified by some other statute, permits the filing of a petition in error in a criminal case in the common pleas court without leave of such court. but they did not distinguish between an ordinance and a statute. When the court decided this case Section 4551, G. C. (1752, R. S.), was in existence and provided the conditions for the prosecution in error. This statute is as follows:

“Appeals may be taken from the decision of the mayor in civil cases in the same manner as from justices of the peace, but when a municipality extends into two or more counties the appeal shall be taken into the court of common pleas in the county in which one or more of the defendants reside. A conviction under an ordinance of any municipal corporation may be reviewed by petition in error in the same manner and to the same extent as was heretofore permitted on writs of error and *certiorari* and the judgment of affirmance or reversal may be reviewed in the same manner, and for this purpose a bill of exceptions may be taken of a statement of facts embodied in the record on the application of any party, but no such petition shall be filed, except on leave of the court or a judge thereof, and such court or judge may suspend the sentence as in criminal cases.”

The latter part of this section provides “A conviction under an ordinance of any municipal corporation may be reviewed by petition in error * * * on the application of any party, but no such petition shall be filed except on leave of the court or a judge thereof,” etc. There can be no doubt about the mode of procedure under this statute, but counsel for plaintiff in error insists that this general statute is restricted to mayor’s courts.

Sections 4527 *et seq.*, provide for the jurisdiction of the mayor’s court and Section 4534 provides that it is concurrent in felonies and other criminal proceedings with justices of the peace. It follows that the procedure on review would be the same in both courts, and Section 4551 would apply to them alike. In the law establishing a municipal court for the city of Columbus, Section 1558-51, G. C., subdivision 1 provides that the municipal court shall have and exercise original jurisdiction within the limits of the city of Columbus “in all actions and proceedings of which justices of the peace have or may be given jurisdiction.” (Section 1558-54 provides that the municipal court shall have and exercise all jurisdiction now conferred by law or which may hereafter be given to police court.) Section 1558-55, G. C., provides that:

“All laws conferring power and jurisdiction upon police courts or justices of the peace, giving such courts or officers

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power to hear and determine certain causes, prescribing the force and effect of their judgments or orders, and authorizing or directing the execution of enforcement thereof, shall be held to extend to the municipal court, unless inconsistent with the jurisdiction conferred upon said court by this act, or clearly unapplicable."

From an examination of these sections it is apparent that all jurisdiction which was formerly conferred upon mayor's courts, justices' of the peace courts or police courts was combined and conferred upon the municipal court, subject to the other and general provisions of the General Code. Section 1558-60, G. C., provides that:

"In all criminal cases and proceedings the practice and procedure and mode of bringing and conducting prosecutions for offenses and the power of the court in relation thereto, shall be the same as those which are now, or may hereafter be, conferred upon police courts in municipalities."

And Section 1558-75, G. C., provides that:

"Proceedings in error may be prosecuted to the court of common pleas of Franklin county from a judgment or final order of the municipal court in the same manner and under the same conditions, including the proceedings for stay of execution, as provided by law for proceedings in error from the court of common pleas to the court of appeals." etc.

It is obvious that Section 1558-75 was not intended to nor does it modify the procedure in criminal cases as stated in Section 1558-60 otherwise there was no reason for inserting this section in the municipal code. It logically follows that Section 1558-75 applies to civil cases only, where error may be prosecuted from the municipal court to the common pleas court as provided for proceedings in error from the common pleas court to the court of appeals. Section 4551, G. C., was in effect at that time, and provided the mode of procedure in certain criminal cases in error proceedings from the lower courts to the common pleas court. This procedure was not modified by the municipal code, but it provided that the procedure shall be the same as those which are now or may hereafter be conferred

upon police courts in municipalities. This mode of procedure was provided in Section 4551 and nothing in the municipal code modifies this provision of the statute, which requires that petitions in error in cases of this character can only be filed when leave of court is granted.

A similar question to the one at bar was passed upon by our supreme court in the case of *Canfield v. Brogst*, 71 O. S., 42, reviewing the case found in 3 C. C. (N. S.), 575; 14 O. C. D., 555. The supreme court in commenting on Section 13751, G. C., in *Canfield v. Brobst*, 71 O. S., pp. 46-47, says:

“No doubt such case may be reviewed in the common pleas court, but the provision does not pretend to modify Section 1752 (4551, G. C.), which prohibits the filing of a petition in error in court to review a conviction for violation of an ordinance except on leave of court or a judge thereof.”

The court is, therefore, of the opinion that leave of the common pleas court or a judge thereof must first be obtained, when error is prosecuted from the municipal court to this court under a criminal conviction for the violation of a city ordinance.

The motion of the defendant in error is sustained, and the petition in error is ordered stricken from the files for the reason that leave of court was not obtained when it was filed in this court, and mandate is ordered sent to the municipal court in accordance with this decision.

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Kuhn v. Traction Co.

**APPLICATION OF THE PHRASES "WILLFUL ACT" AND
"LAWFUL REQUIREMENT."**

Common Pleas Court of Hamilton County.

GEORGE KUHN V. THE CINCINNATI TRACTION COMPANY.

Decided, May 16, 1921.

Workman Injured by Fall of an Elevator—Elects to Sue his Employer Directly—Pleading—Conflict Between the Patten and the McLanahan Cases—Designation of Place of Accident as "Shop" or "Factory."

1. While the statutory definition of a "willful act," making it an act done knowingly and purposely and with the direct object of injuring another," renders it highly improbable that any Ohio employer will ever be held liable for such an act by an employee, a court will not assume to determine from a mere inspection of his pleading what facts a plaintiff may be able to establish when his case comes on for hearing on the merits, and hence an allegation that his injuries were the result of a "willful act" on the part of the defendant will not be stricken from the petition.
2. A violation of any of the provisions of Section 1027 is a violation of a "lawful requirement" within the meaning of Section 1465-76, G. C.,

H. Kenneth Rogers, for the motion.

Roettinger & Street, contra.

DIXON, J.

Heard on motion to strike from the amended petition and to make the same definite and certain.

This action is brought by the plaintiff to recover compensation from the defendant for injuries plaintiff claims to have received while employed by defendant.

It is stated in the amended petition and is not disputed, that the defendant regularly employed five or more workmen, and has been authorized by the Industrial Commission of Ohio, as provided by Section 22 of the Workmen's Compensation Act, to

compensate its employees directly for injuries received by them in the course of employment.

Plaintiff in this case has waived his right to have his claim for compensation adjusted in conformity to the provisions of the act, and has elected to sue the defendant directly, as provided by Section 1465-76 of the said act.

It is consequently clear that the defendant is not liable in this action unless the plaintiff's injuries arose from the willful act of the defendant, or some of the defendant's officers or agents, or from the failure of the defendant, or some of its officers or agents, to comply with some lawful requirement for the protection of the lives and safety of its employees.

Plaintiff was injured by the falling of an elevator used by defendant to elevate coal at its east end power house, plaintiff at the time being on the elevator engaged in the work of lifting a small car of coal by means of said elevator from one floor to another floor or platform about forty feet above. Plaintiff claims that said elevator and its equipment has become worn and weakened by constant and excessive use and was not in good condition, and that an examination by the defendant would have disclosed such condition and the general unsuitability of the elevator for the work it was required to do.

Plaintiff's amended petition contains the following specified averment, to-wit:

"Plaintiff states further, that the injuries so suffered by him arose from the willful act of the defendant in failing to comply with the laws of Ohio, 104 Ohio Laws, at page 194, in that it failed to provide the protection and safety due plaintiff under said laws, in this, to-wit: that it failed to provide a suitable safety brake, and that it failed to provide a socket of sufficient strength to hold the elevator cable to the cab; and that said elevator was defectively constructed, in this to-wit, that the guides or tracks thereof were made of wood and were not of sufficient strength to permit the safety devices to operate so as to prevent the car from falling when the accident hereinbefore complained of occurred; and plaintiff says further, that by long and excessive use of said elevator the same had become weakened and of not sufficient strength to perform the work required of it in elevating coal as aforesaid."

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This allegation together with others, defendant seeks to have stricken from the amended petition. Defendant attacks this averment because it claims it is irrelevant and immaterial for the reason that the failure of the defendant to do the specific things set forth in this paragraph of the amended petition neither charge the defendant with doing a "willful act," nor with violating any "lawful requirement," within the meaning of Section 1465-76, General Code.

With respect to the first contention concerning this averment, counsel for defendant is undoubtedly correct, when we bear in mind that the Legislature has defined the term "willful act," as used in the above section, as "an act done knowingly and purposely with the direct object of injuring another." We can not ignore this definition, even though its acceptance means that the probability of any Ohio employer ever being held liable under this statute for a "willful act" is exceedingly remote. Under this definition of the term "willful act," as we analyze it, there must be an intentional trespass by the employer against the person of the employee, under circumstances which would fairly import criminal as well as civil liability. To do an act purposely means to do it intentionally, not accidentally or by chance. It imports an act of the will, intention, a design to do a particular thing or accomplish a specific result. Hence, before the defendant could be held liable under Section 1465-76 for a "willful act" the plaintiff must prove by a preponderance of the evidence that the defendant, or some officer or agent of the defendant, knowingly and purposely permitted the elevator in question to become and remain unsafe and unsuitable, and this with the direct object in view of injuring plaintiff or some other person.

Even conceding that the purpose for which the act is done may be gathered or adduced from the circumstances under which it is done, which is ultimately a question for the jury, we are nevertheless of the opinion that only in a very exceptional and highly unusual case, could all the essential elements of the above definition be shown. We have no right, however, to assume to determine from a mere inspection of his pleading,

what facts plaintiff will be able to establish when his case comes on to be heard on its merits, and hence, we are not at liberty to foreclose his rights on this claim.

We come now to the second contention of the defendant. Does the plaintiff show a violation of any "lawful requirement," within the meaning of Section 1465-76 in the paragraph of his amended petition set forth above. Defendant claims that he does not, and directs our attention to the case of *American Woodenware Co. v. Schorling*, 96 Ohio St., 305, and the case of *Patten v. The Aluminum Castings Co.*, 31 O.C.A., 481. In the Schorling case, the plaintiff, an employee of the defendant, was injured by reason of a car of lumber falling on him. The defendant has complied with the Ohio workmen's compensation act. The plaintiff alleged that his injuries were due to the negligent failure of the defendant to comply with the provisions of Sections 871-15 and 871-16 of the General Code, and claimed that these sections imposed lawful requirements upon the defendant within the meaning of Section 1465-76.

Sections 871-15 and 871-16 provide in substance, that employers shall furnish employees with safe places in which to work, shall furnish and use safety devices and safeguards and do everything that is reasonably necessary to protect the life, health, safety and welfare of employees.

In the Schorling case the Supreme Court say, page 325:

"We are convinced the term 'lawful requirement,' as used in the constitutional amendment and the statutory provisions involved in this case, was not intended to and does not mean a general course of conduct, or those general duties and obligations of care and caution which flow from the relation of employer and employee, and which rest upon each member of the community for the protection of the others."

In other words, the Supreme Court decided in this case, giving its decision the broadest interpretation, that when there is a general duty of care imposed upon the employer by law, that is a general duty not to be negligent, such general duty is not a "lawful requirement" for the protection of employees within the meaning of Section 1465-76, but where an employer is required by a statute or an ordinance or an order of the In-

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dustrial Commission to do a specific thing or to adopt a specific safety device or safeguard for the protection of the lives, health and safety of employees, and fails to comply with such statute, ordinance, or order, such employer does violate a "lawful requirement," is guilty of negligence *per se*, and is liable to an employee who is injured by reason thereof under the provisions of Section 1465-76.

In the Patten case, the plaintiff, a millwright, was injured while engaged in the work of painting the interior of defendant's plant. His injury occurred by reason of the falling of a temporary scaffold, due to a defective plank therein, which scaffold had been erected by plaintiff and his fellow workers for the purpose of doing said work. The defendant had complied with the provisions of the workmens compensation act, but the plaintiff elected to sue his employer direct, claiming a violation of a lawful requirement by the employer. To establish his claim plaintiff relied upon Section 12593 of the General Code. No claim was made in this case that Patten's employer had been guilty of any "willful act" of negligence.

Section 12593, General Code, reads as follows:

"Whoever, employing or directing another to do or perform labor in erecting, repairing, altering or painting a house, building or other structure, knowingly or negligently furnishes, erects or causes to be furnished for erection for and in the performance of said labor unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances which will not give proper protection to the life and limb of a person so employed or engaged, shall be fined not more than five hundred dollars or imprisoned not more than three months, or both."

In the court of common pleas of Cuyahoga county, Patten recovered a verdict for \$8,750 and judgment was entered in his favor for that amount. This judgment was reversed by the court of appeals of the First District, sitting by designation in Cuyahoga county in the Eighth District, for the reason that Section 12593 did not impose any "lawful requirement" on the defendant within the meaning of Section 1465-76; this opinion of the court of appeals of the First District being in direct conflict with the conclusions reached by the court of ap-

peals of the Eighth District in the previously decided Cuyahoga case of the *City of Cleveland v. McLanahan* (not reported), the former court certified the Patten case to the supreme court, where it is now pending.

In the *McLanahan* case, decided November 20, 1918, the plaintiff recovered a judgment in the common pleas court for personal injuries which he sustained from a defective hoist used by the city in constructing a tunnel from the shore of Lake Erie to a crib located some distance out in the lake. McLanahan was working for the city and the city denied liability, maintaining that in no event could it be held to answer in damages at the suit of one of its employees for the reason that it was protected by the workmens compensation act. McLanahan, however, claimed that it had violated the provisions of Section 12593 *supra*, and hence had violated a lawful requirement within the meaning of Section 1465-76.

In affirming the judgment of the trial court, the court of appeals say:

"All that the jury were permitted to pass upon was whether or not the city was liable to the plaintiff under the provisions of Section 12593, General Code. Our summary of conclusion upon all contentions in which the city calls in question the applicability of this section to the case in hand, and the propriety of hearing testimony on that footing, is that the section, as applied to this case, is a "lawful requirement" within the meaning of Section 29 of the workmens compensation act; that it was within the constitutional power of the Legislature to pass the section to that effect; that the case of *American Woodware Manufacturing Company v. Schorling*, 96 Ohio St., 305, does not impair the effect of the section, so as to affect adversely to the plaintiff below the judgment upon which he stands in this proceeding; that the court below rightly allowed testimony to go to the jury in support of claimed liability under the section made, and properly refused to construe that section in connection with Section 12593 as it was requested to do by the defendant, the city of Cleveland."

In the McLanahan case the jury found that the hoist in question was used on the work both to elevate earth and to carry the workmen from the pit of the shaft at the mouth of the tunnel to the surface of the ground above, and that said hoist

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was unsuitable and improper and was likewise defective in construction. A motion to certify this case was overruled by the Supreme Court, and hence this decision has at least the tacit approval of that court. Section 12593 was in no manner specifically referred to or passed upon in the Schorling case, and hence will come before the Supreme Court for the first time in the Patten case.

In the case at bar, however, the plaintiff Kuhn does not exclusively base his right to maintain this action upon any of the statutes involved in the Schorling, Patten or McLanahan cases. He has in support of his action and in support of the above averment of his amended petition, what none of the above plaintiffs had to support their claims, and that is the provisions of Section 1027 of the General Code. This statute requires owners and operators of shops and factories to do certain specific things with respect to the machinery and equipment used in such shops and factories for the purpose of preventing personal injury. A failure on the part of the employer to comply with the provisions of Section 1027, General Code, is negligence *per se*.—*Variety Iron & Steel Works v. Poak*, 89 O. S., 297; *Acklin Stamp Co. v. Kutz*, 98 O. S., 61.

Defendant contends that there is nothing in the amended petition to show that defendant is the owner or operator of a shop or factory, and hence, Section 1027 is not applicable to this case. We believe, however, that the allegation in the amended petition that "he was employed by the said defendant as an elevator man at its East End power house in Cincinnati, Ohio," sufficiently shows that his place of employment was a shop or factory within the meaning of Section 1002, which defines the term "shops and factories."

Paragraph 4 of Section 1027 reads as follows:

"They shall close in all unused openings of elevators and elevator shafts and place automatic gates or floor doors on each floor where entrance to the elevator carriage is obtained. They shall keep such gates or doors in good repair and examine frequently and keep in sound condition the ropes, gearing and other parts of elevators."

If the duty imposed on the defendant by this paragraph is nothing more than the mere general duty to exercise ordinary

care for the safety of the plaintiff, the defendant would not be guilty of negligence *per se* if he failed to observe its requirements. *Schell v. DuBois*, 94 O. S., 93. But, as shown by the authorities hereinbefore cited, it is negligence *per se* on the part of the employer to neglect to comply with the provisions of this statute, and hence, this statute does something more than reiterate the general common law duties of an employer with respect to his employees. In our opinion, this paragraph of Section 1027 is a direct order to the defendant to do a specific thing, to adopt specific safety devices and safeguards for the protection of its employees. Under the statute the defendant is specifically required to examine its elevators frequently, to keep them and their appurtenances in sound condition, and if necessary, to remove defective parts and replace them with sound parts in the same manner that it would be specifically required to enclose all exposed cogwheels and fly-wheels, and to cover, cut-off or counter-sink all set screws and to guard all saws and woodcutting machinery in accordance with the provisions of other paragraphs of this statute, and not merely use ordinary care to do so.

We therefore hold, that a violation of any of the provisions of Section 1027 is a violation of a "lawful requirement" within the meaning of Section 1465-76, General Code, and that the averment sought to be struck out by the fifth branch of defendant's motion is properly incorporated in the amended petition.

Paragraph 4 of the defendant's motion is also overruled. As to paragraph 1, 2 and 3, the motion is granted. With respect to 1 and 2, it is sufficient to remark that the pleader should state the facts from which it is claimed the alleged legal duty arises. If the legal duty claimed does not arise from the facts pleaded, an averment by the pleader that it does so arise adds nothing to the cause of action attempted to be set forth, and is simply surplusage and a conclusion. With respect to 3, we will state that it is not proper to plead either fully or in substance the general statutes of the state, in view of the doctrine of judicial notice pertaining to domestic legislation.

Inasmuch as there is no reference in the amended petition to any municipal ordinance, or to any order of any state board, the motion to make definite and certain is overruled.

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FIXING THE PERIOD OF DISTRIBUTION.

Common Pleas Court of Hamilton County.

**MARY PATTERSON COTTY v. ANNIE E. ARTHUR AND MIRIAM
BALDWIN.**

Decided, April 15, 1921.

*Wills—Estates Will Not be Cut Down Because of Doubts or Inferences
—Title Quieted Against the Contingency of an Executory Devise.*

The court holds that the executory devise based upon the contingency, "should my daughter, Mary, die without issue her surviving," was dependent upon her death occurring before she arrived at the age of twenty years, the point of distribution provided in the will, and that upon her arriving at the age of twenty she took an absolute fee simple title.

*Charles F. Malsbary, W. A. Hicks, attorneys for plaintiff.
Kramer & Bettman, attorneys for defendants.*

MATTHEWS, J.

This is an action to quiet the title to certain real estate owned by William G. Patterson at the time of his death. The plaintiff alleges that she is the owner of an absolute fee simple title to said real estate. The defendants admitting that the plaintiff owns a fee simple title claim that that fee simple title is subject to a condition subsequent upon the happening of which an executory devise in their favor takes effect. All parties claim under the will of William G. Patterson, and the issue is determinable only by a construction of the terms of that will. The provisions thereof necessary to be construed here are found in Items 4, 5, 6, 7, 8, and 11, which are as follows:

"Item 4. I give, bequeath and devise to my beloved wife, the residence at No. 1732 Freeman Avenue, Cincinnati, Ohio, for her use and enjoyment during her natural life.

"Item 5. I give, bequeath and devise to my beloved wife the use and income from all of my remaining real estate until my beloved daughter Mary arrives at the age of twenty years.

"Item 6. The provisions in Item 3, 4, and 5 to my beloved

wife, shall be in addition to her dower right in my estate, but shall be in lieu of all other demands which she may have upon my estate. But my wife shall be charged with the care, support, maintenance and education of my said daughter Mary, until she is twenty years old as aforesaid.

“Item 7. Subject to the life estate of my wife in No. 1732 Freeman avenue, and the bequest to her of my remaining real estate until my daughter arrives at twenty years of age, I give, bequeath and devise all real estate to my daughter Mary, to her, her heirs and assigns forever, to be conveyed to her as hereinafter provided.

“Item 8. Should my daughter Mary die without issue her surviving, then I give and bequeath to my beloved wife for life all real estate of which I die seized, she to have the income thereof as long as she may survive me. And at her death I give, bequeath and devise to my beloved sister, Mary Jane Arthur, of Williamette, near Chicago, Illinois, the real estate known as 951 Findlay street, Cincinnati, Ohio, and to my beloved niece Mary Jane Greason of Covington, Kentucky, the premises known as Nos. 1401 and 1403 John street, Cincinnati, Ohio, and to my beloved niece Sarah A. Mitchell, of Wichita, Kansas, the premises known as No. 1405 John street and 1732 Freeman avenue, Cincinnati, Ohio, to each of them their heirs and assigns forever.

“Item 11. I hereby bequeath and devise to Philip Roettinger, as trustee, all of my real estate to be held and administered my said trustee in trust for my beloved wife until my daughter Mary shall arrive at the age of twenty years. When my daughter shall arrive at twenty years of age, then my said trustee shall convey to her real estate in accordance with the provisions of my will aforesaid. Should my daughter not live until she arrives at twenty years of age and de cease before that time without issue her surviving, then my said trustee shall hold and administer the real estate so devised to him during the life of my wife, paying the net income to her from time to time as she may require, and at her death he shall convey to my sister, Mary Jane Arthur, to my niece, Mary Jane Greason, and to my niece, Sarah A. Mitchell, or their heirs if they do not survive, the real estate respectively devised to them. I desire that my daughter shall make her home with my beloved wife, and I request both my wife and daughter to take counsel from my said trustee, Philip Roettinger, as they may need advice from time to time. I have full confidence in the discretion and integrity of my said trustee, and request him especially to take an interest in my daughter during her minority.”

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At the time this will was executed the plaintiff, who was the testator's daughter, was twelve years of age, and she arrived at the age of twenty years on June 11, 1911. It is the claim of the plaintiff that the testator by the language in Item 8, "Should my daughter Mary die without issue her surviving" meant when taken in conjunction with the other provisions of the will above quoted, that the executory devise dependent upon that contingency was only to take effect in the event of her death before arriving at the age of twenty years, whereas it is the contention of the defendants that there is no language found in said provisions qualifying the terms of Item 8, and that the natural import of the language used in Item 8 is that the executory devises were to take effect upon the death of the daughter without issue her surviving, no matter when that event occurred.

The fundamental rule universally recognized by the courts in the construction of wills is that the intention of the testator as expressed governs. There are, however, certain well recognized secondary rules for the purpose of ascertaining the intent imbedded in the language of a will. One of these secondary rules is stated in *Collins v. Collins*, 40 O.S., 353, at 364 and 365, in this language:

"It is the rule of the courts, in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate can not be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the interest or estate."

And another rule is as stated in *Bierce v. Bierce*, 41 O. S., 241, at 256, as follows:

"The policy of Ohio law is unfavorable to entails. Is it not also, so unfavorable to provisions 'tying' up property that it will not by liberal construction create such limitations?"

Analyzing the provisions of this will we find that by Item 7 the plaintiff was given the absolute fee simple estate in this language: "I give, bequeath and devise all real estate to my daugh-

ter Mary, her heirs and assigns forever, to be conveyed to her as hereinafter provided." It would not be possible to use language more clearly and positively devising a fee simple estate. Do the subsequent provisions in the will cut down or limit this estate, and if so, to what extent? If they do it is clear from the subsequent terms of the will that to the extent of the change an absolute, vested fee simple estate is divested and a contingent executory estate is substituted.

It will be noted that Item 7 refers to the fact that the estate given to the plaintiff, that is the estate to her, her heirs and assigns forever, was to be conveyed to her "as hereinafter provided." The provision for conveyance thereafter provided is found in Item 11, and that conveyance was to take place upon the arrival of the daughter at the age of twenty years, and in the event of her death prior to that time without issue. the trustee was to hold the real estate during the lifetime of the testator's wife, and then convey.

In the case of *Sinton v. Boyd*, 19 O. S., 30, it was held as stated in the syllabus:

"In the construction of wills, words of survivorship should be referred to the period appointed by the will for the payment or distribution of the subject-matter of the gift, unless a contrary intention is evidenced by the language of the will."

This principle was applied in the case of *Pendleton v. Bowler*, 27 Weekly Law Bulletin, 313, affirmed by the Supreme Court without report in 54 O. S., 654, in *Miller v. Miller*, 10 N. P. (N.S.), 630, affirmed by the Supreme Court without report in 88 O. S., 563, in *Wood v. Wood*, 22 N.P.(N.S.), 302, and in the more recent case of *Caranough v. Rexer*, 23 N.P.(N.S.). 60.

In *Pendleton v. Bowler*, *supra*, the court enters into an exhaustive review of all the cases at that time upon this subject, and at page 320 says:

"If we go back now to the controlling authorities in which the construction of the words 'die without issue' has arisen, we shall find that the provisions of this will as to the personal property point to what is called a *period of distribution* at the death of the wife Anne, and that when such a period is found in a will the proper construction of it is that the words 'die without

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issue' are to be referred to the period during the life of the wife Anne."

And the court held that where there was such a point of distribution found in the language of the will the rule stated in *Parish v. Ferris*, 6 O. S., 574, did not apply for the reason that the testator, by providing for a period of distribution prior to the death of a beneficiary, had shown his intention to limit the ordinary meaning of the words "die without issue" so as to require that contingency to happen before the period of distribution arrives.

The result of the decisions construing wills containing similar provisions is stated in Underhill on Wills, at 465 and 466, in this wise:—

"So, also, if the testator has given a vested remainder to A, which he has expressly directed is to be assigned or transferred to him *after the termination of a life estate in B*, with a devise over to C upon A's death without issue, it will be held that A's death without issue *during the life of B was intended, and if A shall survive B* he will at once take an absolute and indefeasible interest."

The author has collected the authorities in support of the text in a footnote.

Applying these collateral rules of construction to the terms of the will in question leads to the conclusion that the testator has by his own language contained in Items 7 and 11 of the will limited the natural and ordinary meaning of the words used in Item 8, so as to require the contingency of his daughter Mary "dying without issue her surviving" to take place prior to said daughter's arrival at the age of twenty years in order for her estate to be divested and that of the defendants to take effect. A period of distribution is fixed at that time by Item 11, and by Items 7 and 11 the daughter is then to receive a deed for and enter into possession of the estate devised to her by Item 7. According to the authorities that is the time fixed for the vesting of the estate provided for in the will. Independently of all rules of construction, a reading of all the provisions of this will leads the court to the same conclusion. By Item 7 the daughter is given the absolute fee simple estate, and that estate was to be

conveyed to her "as hereinafter provided." By Item 11 it was provided that the conveyance to her was to be made upon her arrival at the age of twenty years; and by Item 11 that conveyance was to be made "in accordance with the provisions of my will aforesaid." In the opinion of the court the ordinary construction of that language in Item 11, is that it refers to the language in Item 7, and the conveyance referred to in Item 7 is that provided for in Item 11; and it would not be possible for the conveyance provided in Item 11 to transfer the estate devised in Item 7 other than by giving to the daughter an absolute fee simple estate. A conveyance by the trustee to the daughter of a defeasible fee simple estate would not satisfy the terms of Item 7. Furthermore, it appears by the terms of Item 11 that the testator provided for the estate to be held in trust until the happening of contingencies. If the daughter lived to be twenty years of age the trust estate was to terminate then and a conveyance made to her. If she did not live to be twenty years of age and died before that time without issue her surviving, the trust was to continue during the lifetime of the testator's wife, and upon her death the trustee was to make the conveyance to those then entitled in fee simple.

If the construction urged by the defendants was adopted the court would be required to say that the testator provided for the holding of the estate in trust for his widow in the event the daughter died without issue before reaching the age of twenty years, but that if she died without issue after arriving at that age, then there was to be no trust estate in favor of the wife, and that the wife should thereupon enjoy a life estate without the intervention of a trustee.

If there was a reason for creating a trust estate in favor of the wife in the event the daughter died before reaching the age of twenty years, it seems to the court that the same reason would exist in the event the daughter died after arriving at the age of twenty years; and the court can see in this situation confirmation of the construction to which the court is lead by the application of the rules of construction heretofore referred to.

For the foregoing reasons it is the opinion of the court that upon the arrival of the plaintiff at the age of twenty years, an

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absolute estate in fee simple vested in her; that the contingency upon which the defendants were to have an estate by way of executory devise can not possibly happen, for the reason that the time within which it was to happen, if at all, has expired, and that therefore the plaintiff is entitled to have her title quieted against the claims of the defendants.

TEST AS TO WHETHER FIVE OR MORE ARE EMPLOYED.

Court of Common Pleas of Franklin County.

STATE EX REL, ETC., v. MICHAEL DERRER, ET AL.

Decided, 1919.

Workmen's Compensation—Construction of the Phrase "Five or More" Employees—Two Operating a Farm Constitute a Partnership.

1. Where two sons carry on the farm of their father, under an agreement to pay him one-third of the profits as rent, their relation constitutes a partnership.
 2. In order to come within the workmen's compensation law, an employer must have in his service five or more men under a contract for continuous service of a character necessary to the regular conduct of the business; and where only four are employed regularly and a fifth intermittantly a case is not presented under the compensation law.
- * Affirmed by the Court of Appeals in an unreported opinion; cause certified by the Court of Appeals to the Supreme Court, which affirmed the judgment of the Court of Appeals, 101 O. S., 498.

KINKEAD, J.

The first question considered is the claim of partnership. The two sons occupied the father's farm in the business of farming and dairying, paying one-third of the profits of the business to their father. The conclusion is that there was a partnership.

The next question is whether defendants had in their service five or more workmen or operatives regularly employed, under any contract of hire.

We formed the opinion at the hearing of the case and upon the evidence that the test of the statute imposing the obligations

of the compensation law was that a firm must have in its service five or more workmen or operatives *regularly* employed under a *contract of hire continuously or regularly*; that is, the necessities of the business must require five or more men to be regularly and continuously employed and not merely casually employed; that is regularly employed every year for a regular and specific purpose which was an absolute necessary requirement of the business, as distinguished from a casual, unexpected, uncertain employment, or one which was unexpected or only occasional. It must require five men all the time or regularly in the necessary conduct of the business.

Only four men were regularly employed throughout the year; part of the time a fifth man was employed; but only for extra or special work at special periods of time; and his employment was casual.

The character of the employment and work rather than the duration of the services constitutes the test of whether the employment is *regular* or *casual*.

There must be a uniform practice or rule to employ a man for the particular service as a universal essential practice in the conduct of the business, which regular and particular service is uniformly essential in the conduct of the business, and not merely occasional.

At the time of trial of this case it seemed clear to the court that the facts developed by the evidence, and the proper deductions therefrom that this case did not come within the compensation law. On further and maturer consideration of the record and the arguments of counsel we adhere to our conclusions formed at trial, the finding and judgment being that the relator has not made a case.

The finding and judgment is in favor of defendants.

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PARTITION OF LIFE ESTATES.

Common Pleas Court of Hamilton County.

SARAH BACHSCHEIDER V. NICHOLAS BACHSCHEIDER ET AL.

Decided, April Term, 1921.

Duration of Estate not a Test as to Right of Partition—But may Determine the Character of Partition to be Decreed.

An owner for life of an undivided interest in real estate may compel partition, but the decree will be limited to partition of the life estate and can not extend to the entire fee simple title, unless one or more of the owners of the fee join in a prayer for partition of the fee.

*John A. Scanlon, for plaintiff.**Burch & Peters, contra.*

MATTHEWS, J.

This is an action in partition. The plaintiff alleges that she is the owner of an undivided one-third interest for her life time in the premises described.

The defendants own the entire fee simple title, subject only to the plaintiff's life estate. They have demurred to the plaintiff's petition on the ground that the owner of a life estate in an undivided interest is not entitled to maintain an action in partition.

Section 12026, General Code, provides that,

“Tenants in common and coparceners, of *any estate* in lands, tenements, etc., may be compelled to make or suffer partition.”

It seems to the court clear from this language that if the plaintiff and the defendants are cotenants, and the plaintiff has a present right to possession, right to partition exists. *Tabler v. Wiseman*, 2 Ohio St., 208, at 211. The statute does not limit the right of partition to tenants in common who own the fee simple titles, nor does it limit it to tenants in common whose estates are of the same duration. The only condition imposed by the statute, as construed in *Tabler v. Wiseman*, which was

approved and followed in *Eberle v. Gaier*, 89 Ohio St., 118, is, that the plaintiff and defendants shall be cotcnants, and the plaintiff entitled to possession so that the decree might operate upon the present possession.

In Pomeroy's Equity Jurisprudence, Vol. 5, 2 ed., Section 2131, at page 4799, it is said:

"A tenant for life or for years may, either at law or in equity, enforce partition of the particular estate, and in equity may make the owners of the future estate parties, and have such a decree as will fairly adjust all the interests in the estate."

It seems to have been uniformly held that a co-tenant of an estate for years, for life, or of any other estate in lands, might compel partition, and the language of our own statute expressly authorizes it.

A question of somewhat more difficult determination is as to the extent of the title to be partitioned, in the event that the plaintiff owns less than the entire fee simple. The question stated concretely, is, can the plaintiff, owning a life estate in an undivided one-third of the property, compel a partition of the entire fee simple title? Assuming that the plaintiff has a right to compel partition of the estate to the extent that she holds the title in common with the defendants, has she the right to cut the title beyond her own estate and to the limit of the fee simple estate in remainder held by the defendants? It is clear that if an actual partition were made, its effect would be only to give to the plaintiff a life estate in severalty in one-third of the property, and would not affect the title beyond the life estate. Has she a right to compel a sale of the entire fee simple estate and secure the estimated value of her life estate in an undivided one-third, out of the proceeds of sale?

In the case of *Baring v. Nash*, 1 Vesey and Beames's Reports, 550, the plaintiff alleged in his bill that he was a lessee in possession of an undivided one-tenth part of certain premises for the remainder of a term of five hundred years, and that the defendants were seized in fee simple, or "otherwise well entitled to nine other tenth parts of the same property."

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The defendants demurred to the bill on the ground that their title was not set out with sufficient certainty, and it was argued that it did not appear that the parties owned the fee simple estate and that partition could not be ordered. The court at page 552, says:

“The other ground of demurrer, alleged *ore tenus*, brings forward a much more important question; whether a bill for partition can be maintained by a person, having only a limited interest, by a term of five hundred years in one-tenth part. * * * It is said, that without the owner of the inheritance of this tenth part, in which the defendant has the term, the court has not before it all the parties interested in the subject; and therefore can not make an effectual decree for a complete partition of the whole estate, binding all parties interested in the estate.”

And on page 553, the court says:

“It is clear, the absolute owner of a tenth part may compel the owners of the other nine to concur with him; and there would be no objection from the minuteness of this interest, the inconvenience, or the reluctance of the other tenants in common, if no objection could be taken to the plaintiff's title: partition being matter of right: whatever may be the inconvenience and difficulty * * * and the habit of the court is not to give costs to the hearing, and to divide the expense of the conveyance and partition in proportion to the interests.

“The question is, whether the lessee for years of one-tenth part has the same right and equity against the owner of the inheritance of that tenth; and clearly the lessee has not the same right to compel that owner to concur. As between the lessee and the remainder-man in fee they are not as tenants in common. They between them represent the absolute interest in that tenth part; but each has a separate, independent interest; and the proceeding of the one can neither avail, nor bind, the other. As the owner of the inheritance therefore can not be compelled to join at the instance of the lessee, a permanent partition can not take place, if the owner of that tenth part will not concur. If therefore he was a party no relief could be prayed against him; nor would he be bound by the partition: or any right of his precluded to consider the freehold as undivided notwithstanding any division of the temporary interest. For that purpose the owner of the inheritance of this share is not a necessary party,

“Still, however, the question remains, whether the owner of the inheritance not being a party, a court of equity will grant a partition at the instance of the lessee for years. * * *

“Therefore both upon principle and authority this plaintiff’s title to the term being clear, and liable to no objection, he is under no necessity of making the owner of the inheritance of this tenth share a party; nor would it be proper to do so; against whom no relief could be had, and the discovery would be useless. The plaintiff is therefore entitled to the same partition here to which he would clearly under the statute be entitled at law.”

In *Jameson v. Hayward*, 106 Cal., 682; also reported in 46 American Rep., 268, it was held, as stated in the syllabus:

“Where there is an estate for years in real property held in cotenancy by the parties to the action and a reversion held by one of them only, the partition must be limited to the estate for years, and, though partition can not be made otherwise than by sale, it can not include the reversionary estate.”

On page 270 the court says:

“The power of the court, in case a sale becomes necessary, is not greater, nor its discretion to be exercised different, than in cases where a partition is made. It would, we think, hardly be contended in this case that, if the court had ordered a partition of the rights of the parties to the property as tenants for years, that it would have been incumbent on it, or even proper, to have awarded to either plaintiff or defendant Brown any share or interest with Hayward in the reversion. It is hard to comprehend how it becomes any more proper to do so in the case of a sale.”

It is true that in *Morgan v. Staley et al*, 11 Ohio 389, it was held that the owner of a life estate in the entire premises, who also owns an undivided interest in fee in the remainder could compel partition. But, in that case the question was not as to whether there was to be a temporary or permanent partition, but whether the plaintiff was entitled to maintain the action at all. If the plaintiff was entitled to maintain the action, then of course, the decree for partition would necessarily be co-extensive with the duration of plaintiff’s title, and inasmuch

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as the plaintiff had the complete fee simple title in an undivided interest, it was the entire fee simple title that was partitioned.

In the case of *Metcalf v. Miller*, 96 Mich., 459, at 462, the court says:

“The owners of the life-estate are holders as tenants in common, and, as between them, partition may be had; but it does not follow that either is entitled to a partition as against the reversioners.”

In *Fitts v. Craddock* (144 Ala., 439), 113 Am. St. Rep., 53, the title was originally owned jointly by Berry and Craddock, each owning an undivided one-half interest. The complainant acquired Berry's interest. Craddock died leaving a will by which he devised to his wife a life estate in the property and a remainder to others, who were made parties respondent to the bill. The complainant acquired the life-estate in an equal half interest, and then filed the suit for partition. The court held that the plaintiff was entitled to compel partition, and of course, adopted the same reasoning as that found in the opinion in *Morgan v. Staley*, *supra*, and inasmuch as the plaintiff owned the entire fee simple title, the decree was that the entire fee simple title should be partitioned. In an annotation to this case on page 256, it is said:

“A cotenant of an estate in possession, though less than in fee, is generally, if not invariably, entitled to maintain a suit for partition, but his suit can not affect estates in remainder or reversion unless specially authorized by statute. * * * In a few of the states, as appears by the opinion in the principal case, such right has been created by statute, and therein a tenant of an estate in possession may compel a partition binding all interested, whether in possession, reversion or remainder.”

The textwriters, among whom is Tiffany, state in general terms that a life tenant may compel partition against all parties, including remaindermen. They do not usually indicate whether the rule announced is the result of statute or otherwise, and the cases cited in support of the text were collected without

discrimination. Of the cases cited by Tiffany (2nd Ed.) Sec. 204 at page 715; *Gayle v. Johnson*, 80 Ala., 273; *Shaw v. Burs*, 84 Ind., 528; *Carneal v. Lynch*, 91 Va., 114, support the text and hold that on the petition of a life tenant the entire fee simple may be aparted. In *McQueen v. Turner*, 91 Ala., 273, *Reinders v. Koppelman*, 68 Mo., 482, and *Brevoort v. Brevoort*, 70 N. Y., 136, also cited, the plaintiff owned a title in fee to a part, and therefore are not authority for the text statement; *Eversole v. Combs*, 130 Ky., 82, also cited, decides exactly the contrary of the text; *Palenthorpe v. Palenthorpe*, 194 Pa., 270, was decided under a statute expressly authorizing a life tenant to compel complete partition. In *Field v. Leiter*, 16 Wyo., 1, the possessory title was actually partitioned and the question of partitioning the remainder in fee was not decided, but the court did, at page 44, cite *Metcalf v. Miller*, *supra*, with approval. The only other case cited by Tiffany is *Gaskell v. Gaskell*, 6 Sim. (Eng. Ch.), 643, in which partition was not granted as a matter of right, but the case was referred to the master to determine whether a sale and reinvestment of the proceeds upon the same limitations would be for the benefit of the owners of the future estate. The court did not refer to *Baring v. Nash*, *supra*, although it had been decided only twenty-five years previously by the same court, and it is manifest that the two cases were not regarded as similar by the court.

The authorities on this subject, it will be seen, are conflicting. There is no Ohio case exactly in point. If a life tenant in part can compel partition, then a lessee for a year may do so. The result would be, that whenever an owner of the fee leased the premises he would run the risk of having the leasehold pass into the ownership of two or more in common and then being compelled to suffer partition of the entire fee simple title. It seems to the court that this would not be desirable, nor in accord with the theory of partition, and is not supported by the better reasoned decisions. The rights of the life tenant are fully protected by permitting him to compel partition of the life estate, and if the circumstances are such that he believes the entire fee should be sold, by proceeding under Section 11925, General Code.

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to sell the entire fee, not as a matter of right, but in the event the court find it would be beneficial to sell it.

It is undoubtedly the law of Ohio that a person owning an undivided estate in reversion or remainder can not compel partition. Under our statutes, as under the law as it existed in England, partition was only for the purpose of enabling the plaintiff to have the possession of a certain part of the premises set off to him in severalty, and the remedy was limited to that purpose. It would not assist the plaintiff in this case in the enjoyment in severalty of one-third of this property, to require the defendants to partition the estate in remainder that is to take effect only upon the termination of her life estate, and it is the opinion of the court that while the plaintiff is entitled to a decree in partition, it must be limited to a partition of the life estate, and can not extend to a partition of the entire fee simple title, unless one or more of the defendants join in a prayer for a partition of the entire fee simple title.

The demurrer is, therefore, overruled.

ENFORCEMENT OF A DEFECTIVE LEASE AFTER TRANSFER.

Common Pleas Court of Franklin County.

WHEELER ET AL. V. NIMS ET AL.

Decided, October 18, 1921.

Lease Defective for Having but One Witness—Transferred to Third Party with Knowledge—Lessor May Not Recover his Rent—But Intended Lessee may ask for Specific Performance Against the Transferee—Who is Bound by Prior Equities—Statutes of Frauds Satisfied—Recording Act Without Application to a Defective Lease—Parties.

A defectively executed lease covering real estate and subsequently transferred to a third party with notice of the purported lease and its defective character, may be enforced against the transferee by the prior intended lessee.

H. A. Williams, for plaintiffs.

Thos. M. Bigger and *S. A. Sharpe*, for defendant, Nims.

ROGERS, J.

The case is heard on separate demurrers of the defendant Nims to the amended petition of plaintiffs and the amended answer and cross-petition of the Kibler Co.; also on said defendant's motion to dissolve the temporary injunction.

One of the main legal questions is this: When a defectively executed lease of real estate has been made between lessor and lessee, and that property is afterwards transferred to a third person with notice of the prior contract of lease, though defective, whether such third person is liable to have the contract of lease enforced against him at the suit of the prior intended lessee. The foregoing is, in substance, what has transpired among the parties, as shown by the pleadings. Nims with notice that the Kibler Co. had a lease, though defectively executed, covering certain described premises, obtained a perpetual lease for the same and other premises; and the Kibler Co. now seeks to have the defectively executed lease enforced as against Nims. True, the suit was brought by the transferrers, but the Kibler Company, by cross-petition, adopts the averments of their amended petition, and is as much a petitioner as if formerly plaintiff in the case. It must be borne in mind that in equity the chancellor looks at substance and not at form to work out equitable remedies. I am satisfied that plaintiffs are proper parties to the suit, and can well be treated, along with the Kibler Co., as joint parties with it.

It seems to be conceded that the Kibler lease, because defectively executed on account of having but one witness to the signature of the parties, is void as a lease. I think the law is too clear on this subject for controversy. However, it is contended that a defectively executed lease is not, according to the Ohio decisions, enforceable in equity as against Nims, although at and prior to the making of the lease to him he had notice of the prior defectively executed lease to the Kibler Company. The lease in question, as I sought to point out in a former opinion,

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is not made void because of the recording acts; but it is void because of the failure to comply with the statute relative to the formal execution of such instruments. Furthermore, the only recording act, if the Kibler Company lease had been properly executed, applicable thereto, is Section 8543, General Code. Sections 8518 and 8519, General Code, have no application to such lease, nor do the decisions construing the latter sections have any bearing on the case before us. And the recording act governing leases such as this one only applies to leases executed according to the statute etc., and even then only protects subsequent *bona fide* purchasers without notice. As I view it, the recording acts are in nowise a limitation upon the equities of the parties in the instant case. The question is purely one of equity between the plaintiffs and the defendant the Kibler Company, on the one side, and the defendant Nims on the other, irrespective of the formal positions they occupy in the suit.

By the settled law of Ohio, the Kibler Company, lessee, upon the execution of the defective lease, acquired an equitable title. See *Abbott v. Bosworth*, 36 Ohio St., 605. Having such a title, the chancellor will grant him such relief as the rules of equity—not law—prescribe.

Upon careful consideration, I am satisfied that the contention of learned counsel for Nims, that the Kibler Company has no remedial right of specific performance on the pleadings as amended as against Nims, is not based upon sound principles nor supported by the Ohio authorities. Stress is placed upon *Richardson v. Bates*, 8 Ohio St., 257, as setting forth the ruling principle governing the case before us. I am unable to discover anything decided in that case which governs the instant case. The suit was one at law to recover for rent on a defectively executed lease, after the lessee had surrendered possession. The defense set forth the fact of the defectively executed instrument, and this was held a good defense, and that the suit was not aided by the statute of frauds. The suit did not seek equity of any kind, but was solely founded upon plaintiff's alleged legal right to recover, which was denied him, and rightfully so, on his pleading. What the court may have said in the opinion must be con-

finer to the case before it, when cited as a precedent to cases of similar tenor. The only similarity between that case and the instant case is that of a defectively executed lease. However, it does not follow that because a lessor under a defectively executed lease can not at law recover his rent thereunder, the lessee may not in equity have it enforced or specifically performed as against third persons with notice of the defectively executed instrument. And I think on examination of all the subsequent decisions in Ohio wherein *Richardson v. Bates*, *supra*, is cited or approved, the right to any relief at law under such leases is denied; and that is so, because the instruments are void at law. In my search I have been unable to find in Ohio any decision binding upon this court, to the effect that such instruments are not evidence of a written contract for a lease, and enforceable in equity as against subsequent transferees with notice.

It is contended that the law of Ohio differs from the law of many of the other states with reference to the enforcement in equity of contracts for the lease of land as against subsequent purchasers with notice. The text in 24 Cyc., 904, supports this contention, and *Langmede v. Weaver*, 65 O. S., 17, is cited as authority for the Ohio doctrine, but that case is based solely upon the statute relative to oil leases, licenses and assignments thereof. It has no application to the case before us. The author did not carefully distinguish between the law relative to oil leases and other leases, in Ohio.

Further, it was suggested in argument that the Kibler lease being inoperative as a lease, could not operate as a sufficient memorandum to satisfy the statute of frauds. An examination of text writers and authorities on this subject, however, convinces me that such defectively executed lease does satisfy the statute. On this subject may be cited 20 Cyc., 257, and cases. And in Ohio an instrument of writing in the usual form of a deed of conveyance, but delivered as an executory contract of sale, is sufficient to take the case out of the statute, though the instrument was not delivered as a deed. See *Thayer v. Luce*, 22 O. St 62. I have not referred to *Lithograph Bldg. Co. v. Watt*, 96 O. S., 74, because it is familiar to counsel. Moreover, learned coun-

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sel apparently seek to interpolate a matter of possession as a necessary equitable ground for granting the relief in the last above case. The third proposition of the syllabus, however, in nowise coupled possession of the lessee with his defectively executed lease to constitute a sufficient equity; but it declares the law to be "a lease, defectively executed, will in equity be treated as a contract to make a lease," and says nothing about possession as a necessary equity upon which to grant relief.

Likewise Wood, on Landlord and Tenant (2d ed.) Section 210, in discussing the formalities required in the execution of leases and the inoperative character of leases defectively executed, says: "But, even where an instrument is inoperative, or void as a lease, it may operate in equity as an agreement for a lease," citing cases.

In *Parker v. Taswell* 2 DeG. & J., 559, wherein the lease was formally defective for want of a seal, the chancellor, among other things said: "I think it would be too strong to say that because it is void at law as a lease, it can not be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect."

In *Cowen v. Phillips*, 33 Beav., 18, in a similar case, the Master of the Rolls said: "It is not under seal and, therefore, under the act, it is not a lease; but, although it is void as a lease the question is whether it is not valid as an agreement. I have no doubt that it is a valid contract; and that this court would specifically enforce it." See also Underhill on Landlord and Tenant, p. 332, and note, wherein the author, in discussing the statute of frauds, says: "And the statute does not prevent the instrument, which as containing present demise and not being under seal is void as a lease, from being enforced in equity." See also Fry on Specific Performance (6 Ed.) Section 108 and cases.

The reason a purchaser with notice is bound by prior equities is based upon the equitable doctrine of his conscience being affected by the notice. See 2 Pomeroy's Eq. Jur. (4th Ed.) 688; Fry on Specific Performance, (6 Ed.), Section 205. As said by Lord Rosslyn in *Taylor v. Stibbert*, 2 Ves. Jr., 437, "If he is purchaser with notice he is liable to the same equity, stands in his

place, and is bound to do that which the person he represent would be bound to do by the decree."

Besides cases cited in briefs, see the following: *Blacknail v Parish*, 59 N. C., 70; *Wiser v. Rice*, 33 Tex., 139; *McCown v Wheeler*, 20 Tex., 372-373; *Hersey v. Lambert*, 50 Minn., 373-379; *Schmidt v. Schopmeier*, 96 Ohio St., 586.

The above cases are those of defective deeds, but the principle is the same with respect to leases. And in the next to the last above case where the purchaser bought with notice the court says "The court was justified in treating him as a 'prowling assignee,' occupied no better position than Smith, his grantor, and subject to the same equities in favor of the plaintiff."

Learned counsel seem to indicate that we are dealing with a verbal or parol contract. Such is not the case. The defective lease, which contains the evidence of the intention of the parties to make a lease and in equity is operative as a contract for a lease, is in writing. Within the lease itself, the intention of the parties is evidenced by the writing to make the lease. As the defective lease shows, the parties intended to make a lease, and a court of equity will treat their intentions, evidenced by the writing, as having been carried out, as between themselves and third persons having notice, on the equitable principle of treating that as done which ought to have been done. Hence, the authorities, cited concerning the enforcement of verbal or parol contracts, are not in point.

It should also be kept in mind that as to the enforcement of real estate contracts, equity may be resorted to, although an action for damages may lie; for it is considered that with reference to such contracts the law may not afford sufficient relief.

Other questions have been discussed in the briefs of counsel which the court does not now deem necessary to decide, believing that the decision on the one question is sufficient for the present. Reaching the conclusion that the Kibler Company on the pleadings has a right of equitable relief for the reasons stated in the opinion, and that the plaintiffs are proper parties to be joined in the suit along with the Kibler Company, the demurrers are accordingly overruled. The motion to dissolve is also denied.

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Cudlip v. State.

**JURISDICTION OF JUSTICES OF THE PEACE UNDER THE
CRABBE ACT.**

Common Pleas Court of Scioto County.

BASIL CUDLIP V. THE STATE OF OHIO.

Decided, May, 1921.

*Violation of the Crabbe Act—Prosecution Before a Justice of the Peace
—Jurisdiction Conferred by Section 6.*

A resident of the city of Portsmouth, arrested upon warrant issued upon affidavit filed with justice of the peace outside the corporate limits of the city for violating the Crabbe act, is tried and convicted. Error proceedings are prosecuted, the sole contention being that the justice of the peace by virtue of the act creating a municipal court in the city of Portsmouth, was without jurisdiction.

Held: That the justice of the peace did have jurisdiction and that Sections 6 and 9 of the Crabbe act expressly repeal Section 38 of such municipal court act.

Stephenson, J.

This is a proceeding in error brought to review the judgment of William McManes, justice of the peace within and for Clay township, Scioto county, Ohio.

There is no dispute as to the facts. Basil Cudlip, plaintiff in error, being at the time a resident of the city of Portsmouth, Ohio, was arrested in the city of Portsmouth, charged with manufacturing intoxicating liquor in the city of Portsmouth and was taken before William McManes, a justice of the peace in and for Clay township, Scioto county, Ohio, tried, found guilty and sentenced to pay a fine of \$1,000.

The only contention is that said justice of the peace had no jurisdiction to issue the warrant and try the case and that the judgment is utterly void and of no force and effect.

Originally the criminal jurisdiction of a justice of the peace was co-extensive with his county and he held a constitutional office.

The usual and ordinary jurisdiction of a justice of the peace at common law was co-extensive with his shire, yet by royal writ there was created a class of justices of the peace popularly known as "justices at large" who by force of a "*dedimus potestatum*" had jurisdiction in two, and some instances three adjoining shires. They were conservators of the peace and had general preliminary jurisdiction over certain crimes and original and final jurisdiction over others.

They could only hear such civil matters as was provided for by prerogative of the Crown and later by statute.

The criminal jurisdiction of a justice of the peace in Ohio has always been co-extensive with his county until restricted by the different acts creating municipal courts.

Section 38 of the act creating a municipal court for the city of Portsmouth, Ohio, found in Vol. 108 O. L., page 470, provides:

"No justice of the peace in any township or mayor of any village in Scioto county outside of the city of Portsmouth, in any proceeding, civil or criminal, in which any warrant, order of arrest, summons, order of attachment or garnishment, or other process except subpoena for witnesses, shall have been served upon a citizen or resident of Portsmouth or a corporation having its principal office in Portsmouth, shall have jurisdiction, unless such service be actually made by personal service within the township or village in which such proceeding may have been instituted, or in a criminal case unless the offense charged in any warrant or order of arrest shall be alleged to have been committed within such township or village."

This is a valid exercise of power and does not contravene Section 26, Article II, of the Constitution of Ohio requiring all laws of a general nature to have uniform operation throughout the state, as the establishment of a municipal court in the city of Portsmouth is by special grant of legislative power upon a particular subject.

See *obiter dictum* by Judge Newman in case *In re Hesse*, 93 O. S., p. 231, citing *State, ex rel, v. Block*, 65 O. S., 370, and *State, ex rel, v. Yeatman*. 83 O. S., 44.

And it may be said in passing that the Crabbe act is created

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in exactly the same way—Section 9, Article XV, Constitution of Ohio.

Section 6 of the Crabbe act, 108 O. L., part 2, p. 1183, provides:

“Any justice of the peace, mayor, municipal or police judge, probate or common pleas judge within the county *with whom the affidavit* is filed charging a violation of any of the provisions of this act, when the offense is alleged to have been committed in the county in which such mayor, justice of the peace or judge may be sitting, shall have final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part of the penalty, but error may be prosecuted to the judgment of such mayor, justice of the peace or judge as herein provided. And in any such cases when imprisonment is not a part of the penalty, the defendant can not waive examination nor can said mayor, justice of the peace or judge recognize such defendant to the grand jury; nor shall it be necessary that any information be filed by the prosecuting attorney or any indictment be found by the grand jury.”

The latter part of the repealing section of the Crabbe act, 108 O. L. Vol., 2, p. 1184, provides:

“All provisions of law inconsistent with this act are repealed only to the extent of such inconsistency.”

Plaintiff in error insists that the Crabbe act does not *directly* repeal the municipal court act and, as repeals by implication are not favored, that Sec. 6 of the Crabbe act is a nullity in so far as it conflicts with Section 38 of the municipal court act in fixing the jurisdiction of justices of the peace, as limited to this particular case, and he cites *Mutual Electric Co. v. Village of Pomeroy*, 99 O. S., p. 75.

The court has no quarrel with the law announced in the above case—it is *the law*; but do we reach a point in the consideration of this case where it becomes applicable?

It must be remembered that since the adoption of our new Constitution the office of justice of the peace is purely a creature of statute, and its jurisdiction may be enlarged or diminished according to the whim or caprice of each succeeding Legislature, if done in accord with the established law.

Is the court called upon to determine whether or not Sections 6 and 9 of the Crabbe act impliedly repeal Section 38 of the municipal court act?

Counsel on both sides seem to think that is the sole question; the court thinks not.

Repeals are of two kinds, express and implied—express when declared in direct terms, and implied when the intention to repeal is inferred from subsequent repugnant legislation.

Specific words of repeal do not need to be used to bring about the express repeal of a statute. It is sufficient if enough is expressed to manifest the intention to repeal.

Where a statute (by words) repeals all former laws within its purview—this is an express repeal and sweeps away all existing laws upon the subject or subjects with which the repealing act deals. Sutherland on Statutory Construction, Vol. 1, Sec. 246.

Reasoning by analogy then the language—"All provisions of law inconsistent with this Act are repealed only to the extent of such inconsistency," constitutes an express repeal.

This court can not concur in the opinion of Judge Routzohn in case of *State of Ohio, ex rel, v. Cusick*, which opinion is set out in full in plaintiff in error's brief.

The learned judge in that case gives to the word "all" in the repealing section of the Crabbe act, a limited construction that this court can not grasp.

In effect that court holds that the word "all" refers only to laws pertaining to prohibition in the traffic of liquor.

"All" is the most comprehensive word we have, and if we ascribe to the Legislature just ordinary sense, we could not think that it would use the word "all" when it intended to express only a very small part.

"All" is a common, ordinary and usual word and must receive its common, ordinary and usual meaning, unless there is some strong reason for giving it a restricted meaning.

This court finds no such reason.

The judgment of the justice of the peace will be affirmed and cause remanded for execution of sentence.

Plaintiff in error's exceptions are noted.

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PRIORITY BETWEEN INCHOATE DOWER AND A MECHANIC'S LIEN.

Superior Court of Cincinnati.

J. ST. CLAIR GLASSMEYER V. NATHAN A. MICHELSON, THE PENN. MUTUAL LIFE INSURANCE COMPANY, A CORPORATION UNDER THE LAWS OF PENNSYLVANIA AND SAMUEL L. MATZ.

Decided, October 13, 1921.

Dower—Can not be Reduced or the Right Thereto Destroyed—But is Paramount to Contracts Entered into by the Husband—Inchoate Dower Takes Preference over a Mechanic's Lien.

1. Inchoate dower right has priority over a mechanic's lien.
2. Where a mechanic or materialman furnishes labor and material under a contract with the husband alone, adding labor and materials to his separate realty improvement and the wife is not a party to the contract and has not given any release, her inchoate dower right is paramount to the right of the mechanic's lien.
3. The mechanic is presumed to know that the improvements added to the husband's real estate became part thereof, which real estate was subject to the inchoate dower right, and hence the risk was his.

L. B. Sawyer and Lem S. Miller, for plaintiff.

M. L. Buchwalter, for The Penn. Mutual Life Insurance Co. Connolly & Bradley, for Nathan A. Michelson and Rae Michelson.

Samuel I. Lipp, for Samuel L. Matz.

GUSWSILER, J.

This is an action to marshal liens, and we are asked to determine the rights of plaintiff as a mechanic, labor and material lien claimant, the rights of three different mortgage claims and the rights of an inchoate dower claim.

In an opinion handed down previous to this date upon hearing had, this court made a finding in favor of the validity and amount of plaintiff's claim under the mechanics lien law of this

state. We come now to a point where decision must be made as to the priority of the claim of the plaintiff. The Penn. Mutual Life Insurance Company, claiming first mortgage lien, by common consent and agreement of all the parties in interest and of all counsel, the lien of this defendant as first lien and as to the amount is settled and determined and will be allowed as prior to all claims of the parties in this action. The next important question for our consideration is the right of Rae Michaelson, wife of Nathan A. Michaelson, one of the defendants to claim her inchoate dower right as against plaintiff, J. St. Clair Glassmeyer, who holds a valid claim for work, labor and materials furnished upon real estate belonging to the husband as allowed under the mechanic's lien law. The contention is, as to priority of liens between an inchoate dower right and a mechanic's lien.

This exact issue has never been determined in Ohio. While the General Code of Ohio expressly defines the dower rights of a widow or widower and defines how inchoate dower may be released, and defines the lien rights of mechanics or materialmen, there is no legislation or case authority determining the priority of one over the other as far as has been brought to our attention.

Counsel for plaintiff contend that General Code, Sections 8318 and 8323-9 have application in the case at bar. After careful examination and consideration, we are of the opinion to the contrary. Counsel for plaintiff also contend, and this contention at first blush appeals and carries the force of logic and reason, that it would defeat the purposes of the mechanic's lien law to permit the wife to acquiesce in the alteration and improvement of a building upon her husband's real estate and not object to so doing, and later interpose her dower rights as superior to the lien for the alteration and improvement that contributed to the value of the building and real estate. However, when this view is carefully considered, we must admit that the mechanic was bound to know that the labor and materials he added to the building became a part thereof, a part of the realty of the husband in which the wife had an inchoate dower right which would become a vested interest on death of the husband.

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He took this risk and chance and could have protected himself by proper security against this hazard.

The evidence discloses no proof that the wife by any act or release waived her inchoate right of dower as to the mechanic's lien. Counsel for plaintiff objected to the wife filing a pleading at this time setting up her claim of inchoate dower right against the plaintiff's mechanic's lien. We believe that it makes little difference (and in this case the wife was served with process and the question of her right is surely before the court), whether she file answer or be in default; if she legally is entitled to dower claim, it can not be taken away by her being in default. *Jewett v. Weldheiser*, 68 O. S., 523.

We are of the opinion that a wife's dower is not subject to a mechanic's lien. See *Wilkinson on Mechanics Liens*, p. 33; *Rockel on Mechanics Liens*, Sections 148 and 152; *Boisot on Mechanics Liens*, Sections 126, 127; *Kneeland on Mechanics Liens*, Second Edition, Sections 24, 25; *Wykes on Mechanics Liens*, Section 18; 19 Corpus Juris, p. 490.

An inchoate dower right will not constitute an ownership within the meaning of the lien act. When dower has been assigned and doubtless after the death of her husband, the widow may charge her separate interest by improvements or alterations ordered by her. If she can not subject her inchoate right of dower during the life of her husband to a mechanic's lien, it follows that it will not be charged by a lien for materials furnished under a contract with the husband although it increases the value of her contingent dower interest. Nothing but a release in due form made by the wife personally, will effect her rights in this respect. Where one statute gives the wife dower in all her husband's real estate and the other statute gives a mechanic's lien in the same property to the extent of the work done thereon, the difficulty must be solved by the application of general principles.

The improvements made in the case at bar became real estate. The wife's dower is a favorite of the law, not resting upon contract, but resulting from the marriage relation. Her's is the older lien. The mechanic bestowed his labor in contemplation of law,

with full knowledge of the prior right of inchoate dower in the real estate, and he is presumed to know that the improvements he was adding to the real estate of the husband became part of the realty and was subject to the inchoate dower right of the wife.

In the case of *Johnston et al v. Dahlgren, et al*, 36 B. Y. S., p. 806; it was held:

“that a wife’s inchoate dower right was not subject to a mechanic’s lien.”

In *Stewart, etc., v. Wicher et al*, 168 Iowa, 269, it was held:

“that dower attaches upon the concurrence of seizin of the husband and coverture of the wife, and continues thereafter as an encumbrance upon the land and fully becomes vested upon the death of the husband, freed from liability for his debts; that the mechanic’s lien was subordinate to the widow’s dower right.”

In the case of *Shaefer et al v. Weed et al*, 8 Ill., p. 511, it was held:

“that a widow’s dower can not be affected by the lien created by the statute for the benefit of mechanics, etc.; but she is entitled to her dower in all the real estate in which her husband was seized during coverture, unless she has released it in the form prescribed by law.”

In *Bishop v. Boyle*, 9 Ind., p. 169, it was held,

“that the widow’s right of dower extended to and included a house erected on lands of her husband and that her claim was superior to a mechanic’s lien for which the property was sold to enforce said lien.

See also *Pifer v. Ward et al*, 8 Blachf. Rep., 252.

In 23 Ill. page 634, *Gove et al v. Cather*, the court held,

“the enforcement of a mechanic’s lien does not cut off dower. It was contended in this case that the right of the mechanic and materialmen was paramount to the dower claim so far at least as regards the improvements out of which the liens arose.”

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In that case as in the case at bar, the improvements were made and materials furnished upon the property of her husband—were on his land—in which she had a right of dower and by no act, contract, or other transaction of the husband could that right be taken from her. The wife in the instant case had nothing to do with the transactions out of which the lien arose. They were the acts of her husband alone. The labor and materials were added to and became a part of the land and the mechanic is bound to know that dower right would attach and on the death of the husband vest in his widow. This risk he chose to run. He could have protected himself by proper security against this hazard.

In *Mark v. Murphy et al*, 76 Ind., p. 534, it was also held:

“that the liens of a mechanic or materialmen were not entitled to priority over the inchoate interest of the wife.”

We do not think that the provision of the General Code, Section 8310, creating the mechanic's and materialmen's liens affect or was intended by the legislature to affect in any manner, the inchoate interest of a married woman in her husband's real estate. Section 8606 gives a married woman an inchoate interest in the lands of her husband and provides that such interest may become vested and absolute upon the happening of certain events. We are clearly of the opinion that the lien law of this state does not give the liens of mechanic's and materialmen any priority over an inchoate interest of a married woman in the real estate of her husband.

It follows, therefore, concluding as we do that Rae Michelson, wife of the defendant, Nathan A. Michelson, one of the defendants, is allowed upon the full selling price of the real estate in question, her full inchoate dower claim against the lien of the plaintiff, J. St. Clair Glassmeyer, computed under the laws of this state based upon the mortality tables.

As against the second mortgage claim of the defendant, Samuel L. Matz, the wife having released her inchoate dower right with her husband in said mortgage, her inchoate dower claim is subject thereto.

Now we come to the question of the amount and priority of the second mortgage held by the defendant Samuel L. Matz, as against the plaintiff's mechanic's lien and as against the defendant Nathan A. Michelson. This mortgage originally was for \$15,500. One thousand (\$1,000) having heretofore been paid, the claim is now made for \$14,500, with interest from June 18th, 1919. The defendant, Nathan A. Michelson, having admitted the sum of \$14,500 due upon said claim, in favor of the mortgagee, a judgment for said amount with interest from June 8, 1910 against said Nathan A. Michelson may be taken.

The evidence discloses that the plaintiff by writing released his claim against this second mortgage up to an amount equal to \$15,000, but contends that the release was given with the understanding and expectation that Matz was to give Michaelson this sum, and Michaelson was to pay the plaintiff, Glassmeyer this sum of \$15,000, while as a matter of fact only \$5,950 was paid at one time and \$500 another, making a total of \$6,450. No attack formally has ever been made to set aside this release but plaintiff contends by his counsel that as against the second mortgage in favor of the defendant, Matz, said mortgage is prior only to the extent of the sum of \$6,450 and no more.

Counsel for plaintiff also contends that the items making up the total of the \$15,500, recited in said second mortgage were bonus and past indebtedness between the parties and were to some extent not of value or proper as a matter of law, and that only to the extent of the amount Michaelson paid to him, the plaintiff, should said lien hold priority over plaintiff's mechanic's lien.

As a matter of law can plaintiff raise this contention? Can he, not being a party in interest attack the consideration of this mortgage. Can he complain about usury or bonus or past consideration in a mortgage where he is not a party thereto?

The evidence discloses no dispute and the uncontradicted testimony on behalf of Matz and Michaelson indicate that \$12,500 was paid in cash and the balance three thousand dollars was a bonus for making said loan. Even if it is considered that the amount of difference between \$6,450, paid by Michelson to plain-

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tiff and \$12,500 was the adjustment between mortgagor and mortgagee of antecedent debts, we are clearly of the opinion that such can not be attacked by this plaintiff under the circumstances of this case.

As to the bonus item of \$3,000 we are in grave doubt as to whether this plaintiff can raise any objection where the mortgagor does not plead usury or failure or non-existence of consideration. Having in mind the ruling found in the 40 O. S., 583, *Jones v. Insurance Co.*, a case involving facts in a way similar to the case at bar, we believe and are inclined but not altogether certain that perhaps plaintiff upon a proper showing of fraud perpetrated to affect plaintiff and the like, might attack same, This being an equity case, we feel that the item of bonus \$3,000 should be disallowed as against the lien of the plaintiff.

In view of this conclusion, we find that the defendant Samuel L. Matz, will be allowed his claim on his second mortgage in the sum of \$11,500 with interest from June 18, 1919, as against the lien of the plaintiff. The effect of this finding will give Rae Michelson her inchoate dower claim in full ahead and prior to plaintiff's lien, but as against the defendant's second mortgage the mortgage comes first. So that as between Rae Michelson and Matz, Matz is first, as between Rae Michelson and Glassmeyer, Rae Michelson is first; as between Matz and Glassmeyer, Matz is prior up to \$11,500 and interest. 61 O. S., 179, *Campbell, Admr., v. Sidwell, Exrx., et al.*; 14 O. S., 438 Syl 3, *Day et al v. Munson et al.*

An order of foreclosure and sale may be taken. The court costs and expenses of sale will be paid first; the first mortgage of The Penn. Mutual Life Insurance Company second; the second mortgage of Samuel L. Matz up to \$11,500 with interest from June 18th, 1919, with a subrogation right to Rae Michelson's dower claim equal to the difference between \$11,500 and interest and \$14,500 and interest third; the inchoate dower right claim of Rae Michelson based upon the full sale price of the property in question fourth, the claim in the amount heretofore allowed in favor of plaintiff fifth.

DISTRIBUTION UNDER A WILL BEFORE IT WAS SET ASIDE.

Common Pleas Court of Knox County.

IN THE MATTER OF THE ESTATE OF PHEBE THOMPSON. DECEASED.

Decided, 1921.

Estates of Decedents—Assets Distributed under Terms of the Will at a Family Meeting—Will Subsequently Set Aside—Executor not Liable for Funds so Distributed though Made Without Order of the Probate Court—Personal Note of Executor Surrendered to Him—Must Stand Charged with Amount of the Note and the Legacy Paid to Him—Remainder of Distribution Valid.

1. Where a will has been probated, executors named in will appointed, appraisement made, filed and approved, and the administration has proceeded to and through the approval by the probate court of the first and the second partial accounts, the personal assets being then practically but not finally distributed, at which stage of the administration of the trust a will contest is begun and concluded setting aside the will, and where, on final accounting thereafter by the acting executor—the other executor having been removed—it appears that shortly after the probate of the will and appointment of executors of the estate, but before the assets were appraised and without any report to or any order of the probate court, \$15,000 of the assets were distributed at a family meeting in which the executors, guardian of a minor legatee, and the testamentary trustee of all of the minor legatees under the will were parties participating; and it is made to appear to the court on the hearing of said final account on exception thereto that all payments made in said distribution of \$15,000 were made in consonance with the terms of the will, especially to the person named in the will, and it further being made to appear to the court from all of the evidence adduced on exceptions seeking to hold said acting executor liable therefore, that a court of chancery would have authorized all of said payments in said distribution and there being no debts or special legacies forbidding, had proper application been made pending the validity of the will—

Held—said acting executor will not be charged, nor does he stand charged with said funds so distributed and the interest thereon or any part thereof on final accounting, though made without order of the probate court; nor is he legally liable to refund, repay, or pay said sum so distributed to the estate or the heirs thereof, though the law in the case required a different distribution from the will, since the distribution was made in accordance with the

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terms of the will pending its validity. and under such circumstances a court of chancery would have authorized it on proper application.

2. Where in such case said acting executor, at said family meeting, is surrendered his personal note of \$500 due his decedent, as and for services rendered during her life time—

Held: said surrender is unlawful. and said executor will be charged and stands charged to pay said note with interest thereon, the code of Ohio being mandatory in the method in which an executor must make claim against his decedent's estate, Section 10727 *et seq.*

3. When in such case the acting executor is a legatee under such will, and as such draws his legacy of \$1,000, which was carried into his account, approved by the probate court, from the fact that he is not an heir-at-law of said decedent, and since said will has been set aside, he will be charged and stands charged to refund said legacy together with interest at 6 per cent thereon from the date of the filing of exceptions to his final account. In such a case the provision of Section 10635 are applicable and control.

C. H. Workman of Mansfield and *P. A. Barry* of Mt. Vernon, for the estate.

Robert A. Carr, of Cleveland, for the exceptor.

WOOD, Judge.

This cause comes into this court on appeal from the probate court of Knox county, and is in this court for hearing on the exceptions of one Harriet T. Miles, one of the heirs of Phebe Thompson, deceased, to the first, second and final accounts of H. C. Swetland executor of said estate.

Phebe Thompson died in the year 1907, possessed of a large estate, and leaving a purported last will and testament which was probated and thereafter set aside.

In this purported will H. C. Swetland and C. E. Miles, sons-in-law of Phebe Thompson, were appointed executors without bond, and May Swetland, wife of H. C. Swetland, was appointed trustee by the will, without bond, for the three grandchildren, who shared equally in the residue of the estate after certain legacies were paid.

Swetland and Miles both qualified as executors, but Miles was later removed as executor on failure to file an account. Swetland filed two accounts, and on the will being set aside, filed his final account, to which exceptions were filed.

The exceptions are 19 in number, and the first 13, with the exception of number 8 may be said to apply to one transaction.

After probating the will, and after Swetland and Miles had been appointed executors, Mr. and Mrs. Swetland and Miles, who was the guardian of Harriet Miles, the exceptor herein, held a meeting in January 1908, at which time \$15,000 of the notes and other securities were divided up, \$5,000 going to Miles and \$10,000 going to the Swetlands.

The vital question is, should Swetland, the acting executor, be charged at this time with the \$15,000?

It will be presumed in the absence of evidence to the contrary, that these parties were acting in their official capacity in making this division; that Swetland was acting as executor, Mrs. Swetland as trustee of the residuary legatees, and Miles as executor of the estate as well as guardian of his minor children, the exceptor herein; we will not presume that any of the parties intended to do a wrong at the time, or throw themselves liable to criminal prosecution.

I have gone over the testimony carefully, submitted to the probate, as to what was said and done by the parties at the time the distribution of the \$15,000 was made.

The testimony of Miles who was not only acting as executor of the estate, but guardian of his minor child as well, we think should have no weight with the court in reaching a conclusion in this case. He had no place at this meeting other than in the capacity of executor or guardian of his minor child, and yet he would have the court believe that he was acting in his individual capacity, branding himself as a rogue and a thief of the first magnitude.

Does the testimony of Swetland the other exceptor, bear out his theory of this case, that he should not be charged at this time with the \$15,000 distributed without an order of court?

Swetland says that this distribution was made in accordance with the residuary clause of the will giving one third to each of the three grand daughters, and that it was done by Mrs. Swetland the trustee of the grand children; that Mrs. Swetland as trustee and Miles as executor and guardian were both present and took part in the same.

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All parties agree that such distribution was made, and the court is satisfied that it was made as testified to by H. C. Swetland, the acting executor, and the question for the court to determine is whether such distribution, made under such circumstances, relieves the acting executor from accounting for the same at this time.

When an executor or administrator makes distribution of funds in his hands without an order of the court, he does so at his peril; and in case the funds distributed are required to pay the debts or specific legacies of the estate, he will be chargeable with such funds, in a sum sufficient to pay such debts and legacies.

The only safe course is for the executor to comply with the statute in making distribution, and receive an order and approval of the court: but if he fails to do so, are his acts void, and will he be called upon a second time to account.

As to whether an executor would be charged a second time with funds distributed without an order of the court, depends on whether or not the probate court at the time of distribution was made, on a proper application would have ordered such distribution, or would have approved of such distribution in an account filed by the executor. In either case if approved by the court the executor would be relieved from accounting a second time.

If the conclusion reached by the court, that this distribution was made by the parties in their official capacity, and that Mrs. Swetland received the same as trustee of the three grand daughters, would there be any question, on a proper showing that the debts and specific legacies were paid, but what the court would have approved of such distribution.

After the debts and specific legacies were paid, the right of Mrs. Swetland to receive the residue of the estate as trustee was fixed by the terms of the will. The failure to have an order of the probate court, ordering distribution, can be of no avail, unless it be shown that at the time it would have been different from the distribution which was made.

If this distribution had been brought to the attention of the court, by application or included in an account prior to the pro-

ceedings to contest the will, is there any doubt but what the court would have approved of such distribution? We think not.

If the distribution was unlawful and not in accordance with the will, the same could not stand, and the executor would be held liable; but when it was made in accordance with the terms of the will, and no creditor is here complaining, we think the same should be approved by this court. But it is said that by Section 10850 the executor must produce vouchers for debts and legacies paid, which he has failed to do. In answer to this it will be sufficient to say that this section provides a method by which the evidence of payment may be preserved, but not the only method, and in this case the fact of distribution is admitted to have been made to some one, and this court finds it to have been made to Mrs. Swetland as trustee. The executor should not be charged with the same at this time.

So finding, the twelve exceptions above mentioned are overruled.

Exception No. 8 wherein the executor is charged with failure to account for his own note of \$500. presents a question of a different nature. At the time a distribution was made of the \$15,000 in securities, this \$500 note with accrued interest was turned over to Swetland, as compensation for services claimed to have been rendered by him in caring for the property of the decedent in her lifetime.

Section 10727 provides that no part of the assets of an estate shall be retained by an executor in satisfaction of his own debt or claim, until it has been approved and allowed by the court.

The statute is imperative as to the method for the allowance and payment of the individual claim of an executor; and the legatees and heirs have the right to insist that the law be complied with, in order that they may know whether the claim is a valid claim against the estate. Swetland having failed to comply with the law in this respect, this exception is sustained, and he should be charged with the face of the note and interest.

Exception No. 14, wherein the executor is charged with failure to account for the \$1,000. legacy to himself, we think should be sustained.

It is conceded that a legatee must refund when it appears

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that the payment was wrongfully made, and we see no reason why an executor should not account for the legacy paid to himself and charge himself with the amount in his account, as the complaining party and the executor are both before the court and a multiplicity of suits is never favored.

We think that Section 10609 G. C. applies to a residuary legatee and not applicable to the facts in this case as to payment of interest and that Section 10635 must govern in this case.

The executor will be charged with this legacy, with interest from the date of the filing of exceptions.

Exception No. 18 relates to the charge of \$100. per year as compensation in looking after real estate. While an executor is not required to collect rent on real estate, yet if he does so he will be required to account for same, and in this case he was so authorized by the exceptor and we see no reason why it should not be disposed of in this case. As to the reasonableness of the charge minds might differ; but from an examination of the statements submitted, we find that for the seven years he collected in rents \$3,785. and interest from investments of the rent money amounting to \$421.57. During this time the exceptor paid taxes and made repairs on the Coshocton avenue property in Mt. Vernon. We think the services of the executor were valuable to the estate in the manner in which he managed the property, and from the evidence we are unable to say the charge is unreasonable. This exception will be overruled.

A finding and decree may be entered sustaining the exceptions Nos. 8 and 14 and overruled as the balance.

Exceptions may be noted for both parties.

INVALIDITY OF A GARBAGE REMOVAL CONTRACT.

Common Pleas Court of Franklin County.

FEIST V. CITY OF COLUMBUS ET AL.

Decided, December 9, 1921.

Municipal Corporations—Authority of Home Rule Cities—To Exact Fees in Reasonable Amounts from Persons in Various Occupations—Equal Protection Clause Violated where Licenses are Made Unreasonable in Amount.

A city ordinance which imposes a license fee of twenty dollars a month upon the business of collecting and transporting garbage through the streets, is not a regulatory measure, but an exaction far in excess of the cost to the city or the value of the privilege granted, and is invalid because of its unreasonableness.

C. P. McClelland, for plaintiff.

Chas. A. Leach and *L. F. Laylin*, for defendant.

ROGERS, J.

The plaintiff shows in his petition that he has a contract with the Deshler Hotel Company of this city, whereby he has bought and agreed to carry away its garbage for a year for the sum of \$200; that the fulfillment of this contract necessitates the use of the streets of the city of Columbus for purposes of transporting the garbage; and that during the existence of this contract the city passed an ordinance, the substance of which is:

“Section 1. That it shall be unlawful for any person * * to engage in the business of buying, collecting or transporting through the streets or public ways of the city of Columbus any garbage * * * without first obtaining a license to engage in such business.”

And Sections 2, 3 and 4 provide that a monthly license of \$20 shall be paid as a prerequisite to engage in such business, and also that for the violation of such ordinance a penalty is attached.

The plaintiff also complains that the city threatens to enforce the above ordinance, and that such enforcement will make it impossible for him to perform his contract and subject him to irreparable losses. And he maintains that the ordinance is void for several specific reasons set forth in his petition, and he seeks an injunction against its enforcement.

A general demurrer is filed to the petition to test its sufficiency. Among the reasons assigned for the invalidity of the ordinance, it is alleged that it is unreasonable and oppressive. Much time and learning has been spent in the briefs of counsel on the subject whether the exaction is a license or a tax. I have reached the conclusion that it does not make any difference what it is called. If there has been an unreasonable exercise of the power of the city in attempted enactment of the ordinance, it is void and non-enforcible. Under our decisions, “home rule” cities may, by or-

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dinance, lay a tax upon persons engaged in various occupations, and such exactions are a valid exercise of the legislative power of such cities. Furthermore cities within the general powers granted by the constitution and statute may grant licenses for the privilege of transacting various lines of business. See as to the former *State ex rel v. Carrel*, 99 O. S., 220; and as to the latter proposition it is too familiar to need citation of authority in its support.

While these rights of legislative grant are conferred upon cities, it is equally fundamental that such exactions must be reasonable, and in matters of licenses the exactions can not exceed the reasonable value of issuing the license and regulating the business. See *Handley v. Westerville*, 10 N.P.(N.S.), 521.

Further, in matters of excise taxes (and the case before us if not a license is an excise tax), when a privilege is taxed the tax on the privilege can not exceed the value of the privilege originally conferred, or its continued annual value thereafter. Assuming therefore that the exaction is an excise tax, or a tax on a privilege, if the tax exceeds the value of the privilege taxed it violates the provisions of the constitution relative to the inviolability of private property, the equal protection and general welfare clauses of the constitution. See *Saviers v. Smith*, 101, O. S., 132, 136, 137, 138; *Southern Gum Co. v. Laylin*, 66 O. S., 578; *Janes v. Graves*, 15 N.P.(N.S.), 193).

The question, among others, is whether the ordinance is unreasonable. I am satisfied it is. The exaction of twenty dollars monthly for the privilege of purchasing, or collecting, or transporting garbage etc., whether treated as a license or a tax has no semblance of reasonableness about it. It matters not whether the person who engages in the business be the original producer and owner of the product, or buys the product from another; or how great or small the quantity or the value of the garbage may be, if he wishes to transport it on the public streets, whether it be once a month or one thousand times a month, he must pay monthly \$20. for doing so, as long as he may have to use the streets for that purpose. As a regulatory measure the fee is not limited, as the law requires, to the reasonable value of issuing the license and regulating the business, but is far in excess of

such uses. As an excise tax as well as a license, it clearly violates the constitutional safeguards above mentioned in exacting a fee far in excess of the reasonable value of the privilege granted. What value, if any, can be attached to the privilege, not enjoyed by others as to other products, of transporting one's own garbage on the highways? No particular kind of vehicle is sought to be taxed in connection with the business so as to make it of value to the user, or of injury to the streets, to use the streets for such transportation. But no matter what the means of transportation, the person who engages in the business of transporting the product must have a license for the privilege.

It is evident that the real purpose of the ordinance is not to protect the health of the community or for sanitary reasons, and therefore, a police regulation. For there is no restriction whatever as to the manner or means of transportation. If the price is paid monthly, the privilege, unlimited in every way, is granted the licensee. It is easy to see the object of the ordinance. Its covert purpose is to compel all persons within the city, who may have waste products from their tables or otherwise, instead of utilizing the product for their personal profit, to surrender the property right therein by abandoning the same so that the city may monopolize the business of garbage disposal.

If the ordinance in question be held valid, every person engaged in the business of transporting any product he may possess may by ordinance be charged \$20.00 a month so long as he engages in the business of using the streets for such transportation. This cannot be the law. Garbage is no different, if properly handled, from any other products from stores and factories, which although they have a value, are waste in the particular business. Yet the proprietor may be virtually prohibited from disposing of his waste product because the streets are not open to him for their transportation unless he pay \$20.00 monthly.

In the final analysis, the privilege of the individual use of the streets and public thoroughfares, which do not belong to the city but to the public, may virtually be taken away from every citizen by such unreasonable exactions, as appear from the ordinance in question. This cannot be tolerated and the demurrer is accordingly overruled.

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**LIABILITY FOR INJURY TO A PASSENGER IN AN AUTOMOBILE
IN COLLISION-**

Common Pleas Court of Hamilton County.

MARY L. RUSKAMP VS. THE CINCINNATI TRACTION COMPANY.

Decided, December, 1919.

Negligence—Of the Driver of an Automobile—May not be Imputed to an Injured Passenger, When—Not Error to Repeat in General Charge Principles set Forth in a Special Charge—Where Emphasis is not Given to One View of the Case.

The plaintiff, having informed the owner of an automobile, who boarded with her, that she intended to go marketing, was invited to ride in the automobile with him as he was going in the same direction on his own business. The owner drove the automobile and the plaintiff rode on the front seat beside him but took no part in the operation of the automobile. A collision took place between the automobile and a street car in which the plaintiff was injured. *Held:*

1. That the negligence of the driver of the automobile could not be imputed to the plaintiff.
2. That stating in the general charge rules of law already stated in a special charge, but without referring to the special charge, was not error where no special theory of the evidence was emphasized and the law favorable to the respective parties was given equal prominence in the manner of its statement and repetition.

Galvin & Bauer, for plaintiff.

Sherman T. McPherson, for defendant.

MATTHEWS, J.

The plaintiff recovered a verdict against the defendant for damages on account of personal injuries, and the case now comes before the court upon the motion of the defendant for a new trial.

The evidence disclosed that the plaintiff conducted a rooming and boarding house in a suburb of Cincinnati; the house was

*Error not prosecuted.

owned by one, Smith; the plaintiff rented the house from him, and Smith boarded with her. Smith owned an automobile, and on the occasion in question having some business in the center of the city to attend to, and hearing the plaintiff say that she had to go to market invited her to ride with him in his automobile. Smith drove the automobile without any direction or control on the part of the plaintiff, and when they reached Seventh and Vine streets a collision took place between the automobile and the defendant's street car. The plaintiff was injured, and this action was brought on account of those injuries.

The defendant urges two grounds upon which it claims a new trial should be granted:

First. That the court erred in charging that the driver's acts could not be imputed to the plaintiff. In this charge the court followed the rule announced in the recent case of *Toledo Rwy. & Light Co. v. Mayers*, 93 O. S., 304, and *Commissioners v. Bicher, Admx.*, 98 O. S., 432.

In the opinion of the court the evidence in the case at bar disclosed without contradiction that the plaintiff was the mere guest of the driver of the automobile, and therefore was not chargeable with any negligence that may have been committed by him.

In the last cited case the court at page 436, in explaining the first cited case says:

"In that case where a guest of the owner and driver was injured it was held that the negligence of the driver of an automobile which comes into collision with the street car, is not imputable to the guest, although the guest is required to exercise ordinary care for his own safety and to reasonably use his faculties of sight and hearing to avoid danger instant to crossing the track. But it is the function of the jury to determine from the facts shown in each case whether the injured 'person used such care, and what care the circumstances required.'"

In the case at bar the court did instruct the jury that the plaintiff was required to use ordinary care, and in defining ordinary care as applied to the plaintiff charged:

"Ordinary care as applied to the plaintiff means such care as persons of ordinary care and prudence observe when riding

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in automobiles as guests of the driver, at street intersections in the street to avoid danger and injury to themselves arising from the street car on tracks in the streets at said intersection."

And, also

"While the negligence, if any, of the driver of the automobile can not be imputed to the plaintiff, it was her duty personally to exercise ordinary care for her own safety as distinguished from any act on the part of the driver of the automobile. She, of course, was not required to exercise the same watchfulness as the driver of the automobile to avoid danger, but she could not rely implicitly on the care of the driver. When and if in a position to see and apprehend danger, if any, it was necessary for her to exercise ordinary care for her own safety, and if she did not do so, and in consequence of her failure to exercise such care she was injured, she can not recover, even though the defendant was guilty of negligence as claimed by the plaintiff and such negligence contributed to produce the injury."

Second. It is urged that the court erred in repeating the law applicable to imputed negligence. At the request of the plaintiff the court gave a special charge upon the subject of imputed negligence. In its general charge in charging the jury on the rights of the parties, the court perforce was required to and did touch upon the doctrine of imputed negligence, in charging on the subject of the drivers sole negligence being the proximate cause of plaintiff's injury.

At the conclusion of the general charge plaintiff's counsel requested the court to explain the meaning of the word "imputed" that had been used by the court, and in response to that request the court did again refer to the subject of imputed negligence. But in every instance in its general charge when the court touched upon the subject of imputed negligence, it, at the same time charged the jury that in the event it found that the driver's negligence was the sole proximate cause of the collision, then the plaintiff could not recover. In other words, the court in withdrawing from the consideration of the jury the subject of imputed negligence always coupled it with the statement that if the jury found that the driver's negligence was the sole cause of the collision, then their verdict must be for the defendant, because in that event it would have been found

that the defendant's negligence was not the cause of the collision.

In the opinion of the court the defendant suffered no prejudice by the repetition in this way of the law applicable to imputed negligence in conjunction with phases of the law favorable to the defendant, nor was it thereby emphasized or given undue prominence. Counsel refers in support of his position on this point to the case of *Cincinnati Traction Co. v. Nellis*, 81 O. S., 535. An examination of that case discloses that the ground of reversal was that the court erred in giving a certain special charge. The case was not reversed because of repeating the law in the general charge that had already been given in a special charge. The court does say that in that case undue importance was given to certain features of the case by repetition, but does not reverse the case on that ground. Furthermore, an examination of the record of the case will show that the parts repeated were applications of law to specific features, or theories, of the facts of the case.

The charge in the case at bar is not open to that objection for the reason that in the respect in which it is criticised all the court did was to instruct the jury that under the law the negligence of the driver of the automobile could not be charged against the plaintiff, and that if it found that the defendant was guilty of negligence proximately contributing to the collision, then the negligence on the part of the driver would not prevent a recovery by her; and in all instances immediately stated the rule favorable to the defendant, that if the collision was caused solely by the negligence of the driver then the defendant not being negligent, the plaintiff could not recover.

It has been the uniform practice in this state to make the general charge of the court cover every element of the case, so that the jury would have the benefit of a complete, logical and consecutively stated rule to guide it in its deliberation. Upon examining the record in the case of *Byal v. Bahl*, 90 O. S., 129, which affirmed the judgment of the common pleas court, we find the trial judge expressly stated to the jury that the special charges and the general charge, would be to a large extent duplicate statements of the law. The language used was:

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“It may be possible some of these are practical duplicates of what will be given in the general charge, as they are recognized and established principles of law by courts of last resort and they may be in the identical language as in the general charge to be given at the close of the case, but you will take all of them as the law which governs you.”

It will be found that the special charges covered practically every feature of the case, and that the court in its general charge likewise instructed the jury on the law applicable to every phase of the case. This, as the court understands it is the common practice so far as general charges are concerned, and unless some particular element of fact or theory of the evidence as distinguished from a rule of law is emphasized to the prejudice of the losing party, no error has been committed. If the rules of law and theories of the evidence favorable to both sides are repeated and emphasized equally, no prejudice results to either party.

In discussing this subject the circuit court in the case of *Rupp v. Shaffer, Admr.*, 21 C. C., 643, at 650 and 651, says:

“We do not mean to say that the court having given the special charges as requested is prevented from treating of the same subject in its general charge, but it is manifestly contrary to the statute for the court having read the special charge to proceed orally to qualify, modify or in any manner explain the particular special charge to the jury, as was done in this case.”

It is not the repetition of the law that lays a charge open to objection. It would be difficult to find a charge in which there was not some overlapping and repetition. It is only where the court repeats and emphasizes one side of a case without a corresponding repetition and explanation of the other side that the charge is open to objection. No such one-sided emphasis exists in the charge given in the case at bar. It is not open to the criticism that was made to the action of the court in *American Steel Packing Co. v. Conkle*, 86 O. S., 117, in which ten special charges were given all emphasizing one proposition favorable to the defendant without an equal repetition of propositions favorable to plaintiff.

Other cases in which the objection was raised and overruled, that the court repeated certain propositions of law in special and general charges, are: *Smart v. Nova Cesaria Lodge*, 6 C. C (N. S.), 15, affirmed without report, 73 O. S., 387; *Railway Company v. Moreland*, 12 O. C. D., 612, and affirmed without report, 60 O. S., 604; *Traction Company v. Baron*, 2. N. P. (N. S.), 633; *Curlis v. Brown*, 9 Oh. App., 19, at 22.

In the opinion of the court no error prejudicial to the defendant was committed, and its motion for a new trial is therefore overruled.

IMMUNITY AGAINST CIVIL ACTIONS.

Common Pleas Court of Franklin County.

WESLEY C. BATES V. SAMUEL L. BLACK ET AL.

Decided, February 20, 1915.

Conspiracy—Not Ground for a Private Suit, Unless—Damages Suffered Must First be Shown—Immunity in Performance of Judicial Duties—Void Judgments Distinguished from Those Which at Most are Only Erroneous—Sham Pleading.

1. Under the rule a civil action does not lie against alleged conspirators unless something is shown to have been done, independent of the conspiracy, which resulted in damages to the plaintiff, a suit can not be maintained against a group of judges, jurors and other judicial officers because of humiliation and injury resulting from an alleged illegal prosecution and commitment to jail for contempt; nor for prosecution for criminal libel, resulting in conviction and judgment in a court having full jurisdiction, which judgment is still in force; nor on other charges growing out of such contempt and criminal libel proceedings.
2. Moreover, judges of courts of general authority are invested with immunity from private suits directed against them individually because of judicial acts performed, and this is true regardless of alleged improper motives in the performance of such acts.
3. A motion to strike from the files a petition directed against judges, jurors and others, based on such causes of action, may be granted under the inherent power of the court.

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CURTAIN, J.

This cause is now submitted upon the motion of defendants, Samuel L. Black, M. R. Patterson, Franklin Rubrecht and Horace S. Kerr to strike the petition in this case from the files "for the reason that it states no cause of action, shows that no cause of action exists in favor of plaintiff against the defendants, and that the filing thereof was a pretext to scandalize courts and officers and for other ulterior purposes."

Thirty-two persons are made defendants to this action, among them being the six judges of the court of common pleas of Franklin county, the probate judge of said county, the police judge of the city of Columbus, twelve persons who served as jurors in said police court and three justices of the peace. The plaintiff in substance alleges that his cause of action "is founded upon a series of illegal and unlawful acts committed by defendants, from time to time, by several or all of defendants conspiring together, aiding and acting together, or several of said defendants acting in less numbers, but under a common understanding and for a common purpose to accomplish an unlawful and illegal and malicious prosecution of plaintiff."

"The general rule is, that a conspiracy can not be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. The damage is the gist of the action, not the conspiracy." Cooley on Torts, 2nd ed., 143.

"As it is the wrong accomplished—in other words the deprivation of some right—that must support the action, it follows that if what the plaintiff has been deprived of was not a right at all but an advantage merely hoped for, he can not maintain his suit." Cooley on Torts, 144. See also 2 Bates Pleading 1231 and 8 Cyc., 645.

The question presented, therefore is, what wrong does the petition show the plaintiff has suffered, or what right has he been deprived of that would entitle him to maintain an action, independent of the alleged conspiracy against one or more of the defendants named in the petition?

The first alleged wrongful act is in substance that Samuel L. Black, who the petition shows, was the judge of the probate and

juvenile courts of Franklin county, Ohio, did on the 6th day of February, 1914, unlawfully instigate certain contempt proceedings against said plaintiff, and by false statements of facts, supported by a fraudulent and false certificate or mittimus commit said plaintiff to the Franklin county jail under an illegal sentence to the humiliation, injury and damage of said plaintiff.

It appears from the petition that the plaintiff commenced habeas corpus proceedings in the court of common pleas of said county, presumably for the purpose of being released from his commitment for said alleged contempt, and that the same was heard by Thomas M. Bigger, one of the judges of said court, but the petition fails to state what disposition was made of the habeas corpus proceedings. There is no averment, however, that the plaintiff was discharged, or that the sentence of the probate court has ever been vacated or reversed.

The averments of the petition in respect to the contempt proceeding, appears to be more in the nature of a charge of false imprisonment than one of malicious prosecution. The gravamen of this charge is the unlawfulness of the imprisonment. The petition failing to show that the sentence of the probate court has been vacated or reserved, it is conclusively presumed that the plaintiff was lawfully sentenced and imprisoned.

If the language of the petition in reference to the contempt proceeding be construed as stating a cause of action for a malicious prosecution, the same result must follow for the reason that the judgment, so long as it remains in force, will be conclusively presumed to have been rendered upon probable cause therefor.

The plaintiff's theory, as disclosed by his brief, is that the contempt proceedings had against him were void and not merely erroneous or irregular.

Is this theory supported by the averments of the petition when they are alone looked to?

We find it stated in the petition, in substance, that Samuel L. Black, was probate judge of Franklin county; that Samuel L. Black "did on the 6th day of February, 1914, unlawfully instigate certain contempt proceedings against said plaintiff and by false statements of facts, supported by fraudulent and false cer

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tificate or mittimus commit said plaintiff to the Franklin county jail under an illegal sentence.”

It is apparant that the plaintiff inadvertently used the word “instigate” in the place of the word “institute” and that it was his intention to charge Black with instituting said contempt proceedings. The power is conferred by statute upon courts, and under certain circumstances the judges thereof to punish for contempt, and the statute prescribes the procedure therefor. General Code, Section 12136, *et seq.*

It has been held by our supreme court that:

“The power to hear and determine a cause depends upon jurisdiction; and it is *coram iudice* whenever a case is presented, which brings this power into action.”

“But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained.”

“When these appear, the jurisdiction has attached; the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred, and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity force and effect of the final judgment when brought collaterally in question.” *Sheldon v. Newton*, 3 O. S., 494.

In this case the statute gave the tribunal capacity to entertain the complaint against the plaintiff for contempt. The petition shows that the complaint was actually preferred and the plaintiff brought before the court or judge to answer thereto.

Under these circumstances, according to the authorities cited, jurisdiction attached and became perfect. The proceeding was not, therefore, void as claimed by the plaintiff.

If he desired to avoid the effect of the judgment against him, the Statute Section 12146, gave him the right to prosecute error, but he had no right to attack the judgment collaterally, as he has attempted to do in this action.

It further appears from the petition that Samuel L. Black

filed in the police court of the city of Columbus, Ohio, an affidavit in which he charged the plaintiff with the crime of criminal libel; that the plaintiff was tried thereon in said court before defendant, Samuel G. Osborn, the judge thereof and a jury; that he was convicted and that said judgment is still in force. There can be no question but what the court had jurisdiction of the subject matter of this case, under the law, and the other facts necessary, to confer complete jurisdiction, are shown by the petition. This proceeding was not therefore void as claimed. Proceedings in error are now pending in the court of appeals of Franklin county to reverse the judgment rendered against the plaintiff, and so long as that judgment remains in force no action can be prosecuted against any person upon the ground that the same was a malicious prosecution, the presumption being that there was probable cause for the action and the judgment rendered therein.

In the case of *Dunlap v. Glidden et al* (31 Maine, 435) 52 Am. Dec., 625, the court in its opinion said:

“This cause of action in these suits is the same, but the same defendants are not all joined in each of them. The declarations allege in substance, that Benjamin Glidden commenced an action against the plaintiff to recover several parcels of real estate, that a verdict was rendered in that action in favor of Glidden and judgment was entered on the verdict; that all of the defendants fraudulently conspired together to defeat the plaintiff's title, and to aid Glidden in his suit and that by the false testimony of two of the defendants and others, the verdict was obtained against the plaintiff.

“These actions are brought to recover damages arising from the judgment obtained by Glidden against the plaintiff and if they should be sustained, the record would present the anomaly of a judgment remaining in full force and of another, in which damages were rendered, on account of the existence of the former one. But the judgments against the plaintiff, so long as it remains in force, must be considered as true and just. He can not be permitted to aver the falsity of that judgment, as the ground for the recovery of damages. It constitutes in itself a clear and unequivocal denial of his allegations. He says, that by the fraud and conspiracy of the defendants, he has lost the land, but the judgment imports that it was properly rendered in the ordinary course of judicial proceedings.”

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And on page 627 of the opinion it is said:

“If the judgment was obtained, as is contended, by fraud and perjury, the plaintiff has ample remedy by law. The court which rendered the judgment, upon proof of these allegations, would be bound to grant a new trial, so that, upon a further investigation justice might be done.”

My conclusion is as to the two charges considered that neither of them state a cause of action against any person named as defendant, whether considered separately or together and in connection with all the other averments of the petition.

These two charges appear to be the foundation for all the other charges contained in the petition. That is, all the other charges are either introductory to or grow out of one or both of said charges.

For instance the charge in respect to the insufficiency of the affidavit upon which the criminal libel case was founded; the manner in which the jury in that case was made up; the alleged misconduct of the jury; the refusal of the court to admit certain testimony tendered by the plaintiff; the procuring and giving false testimony, are all matters arising out of the trial of the criminal libel case and if the proper foundation had been laid therefor, could have been assigned as error. The plaintiff has attached to his brief a copy of the petition in error filed by him in the criminal libel case in the court of appeals, and I find that most if not all of these matters have been covered by the assignment of errors in that case, which is still pending in that court.

The petition contains averments as to the refusal of Judge Bigger to cite Daisy D. Perkins for contempt. The arrest of Edward Grunden; the alleged perjury of E. Ray Hummel in the Grunden case; the action of Judge Rogers in permitting Hummel to testify; the alleged perjury of John B. Whitehawk; the alleged attempt of Rev. Harry E. Robinson to procure Maude Wade to commit perjury; of the refusal of three justices of the peace to issue warrants against certain parties for perjury. These allegations fail to show that the plaintiff was thereby deprived of any right, but that if he was deprived of any thing

it was only a hoped for advantage, and that Judge Cooley says furnishes no ground upon which to maintain an action. Cooley on Torts, page 144.

There is an averment in respect to the larceny of a portion of a so called bill of exceptions prepared by Daisy D. Perkins in the libel case. No cause of action can be predicted upon that ground so long as the libel case remains undipsced of. The six judges of the court of common pleas of Franklin county, the probate judge of said county and the police judge of the city of Columbus are made parties to this action. The petition seeks to connect all of these judges with all of the transactions alleged in the petition upon which any cause of action could possibly be uals and the plaintiff disclaims any intention to sue them in their official capacity. In some instances the official capacity of these parties clearly appears from the averments of the petition. That is notably so in respect to the probate and police judges. The court will take judicial notice of the fact that Edmund B. Dillon, Thomas M. Bigger, Charles M. Rogers, Edgar B. Kinkead, Frank Rathmell and Marcus G. Evans, named as defendants to this action are the judges of the court of common pleas of Franklin county, Ohio.

The acts charged against all of these judges is the wrongful performance of official duties imposed upon them by law, or the wrongful refusal to perform such duties, or the refusal to perform acts which the plaintiff claims it was their official duty to perform.

The plaintiff's claim, if I understand it, is that the act charged against defendants, Samuel L. Black, Samuel G. Osborn, Edmund B. Dillon, Thomas M. Bigger, Charlse M. Rogers, Edgar B. Kinkead, Frank Rathmell and Marcus G. Evans, where void as judicial acts and that, therefore said defendants, in performing said acts, were not acting in a judicial capacity but as individuals.

The plaintiff seems to have overlooked the distinction between void and erroneous judgments. The only reported case that I find in Ohio is that of *Nienaber v. Tarvin, J.*, 7 N.P., 110, decided by the court of common pleas of Hamilton county, where the case of *Bradley v. Fisher supra* was followed.

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I will say also of the case of *Truesdale v. Combs*, 33d Ohio State, that while that question is not decided, yet the principle is in that case recognized.

In the case of *Wyatt v. Arnot*, 94 Pac., 86, many of the authorities upon this subject are collected and commented upon. In that case the court held that:

“A judge who, because of malice or corruption, renders an erroneous decision, or fails to render a decision within a reasonable time, is liable to impeachment, but in neither case can he be required to answer to a private individual in an action for damages.”

There is another principal which he has overlooked and which will dispose of every charge made in the petition against the eight judges and twelve jurors, and that is that:

“Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.” *Bradley v. Fisher*, 80 U. S., 646, *Nienaber v. Tarvin, J.*, 7 N.P., 110; *Cocley on Torts*, 474 *et seq.*; 23 Cyc., 568 and cases cited.

The opinion in the case of *Bradley v. Fisher*, *supra*, was delivered by Justice Field and the reasoning therein is clear and convincing. The whole opinion should be read. I quote therefrom as follows:

“The principle, therefore, which excepts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial function obtains in all countries where there is any well ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied that we are aware of in the courts of this country.”

It has, as Chancellor Kent observes, “a deep root in the common law.” *Yates v. Lansing*, 5 Johns., 291.

“Nor can this exemption of the judges from civil liabilities be affected by the motives with which their judicial acts are performed. The purity of their motives can not in this way be the subject of judicial inquiry.* * *

“In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commission, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily or oppressively, they may be called to an account by impeachment and suspended or removed from office. * * *

“The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts, existing when there is jurisdiction of the subject matter, though irregular and error attended the exercise of the jurisdiction, can not be affected by any consideration of the motive with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motive could be inquired into, judges would be subjected to the same vexatious litigation upon such allegation, whether the motive had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motive proceeding, the law has provided for private parties numerous remedies, and to those remedies they must in such cases resort. But for malice or corruption in their action while exercising their judicial function within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment or in such other form as may be specially prescribed.”

Judge Cooley in his work on Torts, page 477, says:

“Whenever, therefore, the state confers judicial powers upon an individual it confers them with full immunity from private suits. In effect the state says to the officer that those duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state and the peace and happiness of society; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the state, speaking by the mouth of the common law says to the judicial officer.”

“And on page 479 he says that this immunity ‘extends also to grand and petit jurors in the discharge of their duties as such.’”

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I regard the principles thus announced as being established, by the weight of authority in this country, and as stating a principle of law which should be applied to the facts of this case.

I have shown that as to certain charges against some of the judges named as defendants, that they had jurisdiction as to both the subject matter and the person of the plaintiff. As to all of the other charges made against them they had, at least jurisdiction of the subject matter, unless it be the charge made against the six judges of the court of common pleas refusing to consider the petition of the plaintiff to remove Samuel L. Black as judge of the probate and juvenile courts. And as to that, it is apparent that said petition was presented to said judges in their official capacity, and in argument it was urged that they had jurisdiction in that matter, so that so far as the question not being considered is concerned, it is the same as if they had jurisdiction.

The eight judges and twelve jurors are, therefore, under the rules of law stated exempt from being sued in a civil action, upon any of the grounds alleged against them in the petition.

How does the case stand? Twenty of the persons named as defendants are absolutely exempt from being sued in this action upon any of the grounds alleged in the petition. The averments contained in the petition in reference to the contempt proceedings and the criminal libel case, which are the foundation of the plaintiff's action, state no cause of action against any of the defendants named in the petition. There are only twelve defendants named in the petition who are not exempt from being sued in this action, viz: Emmett Thompkins, Horace S. Kerr, Daisy D. Perkins, Franklin Rubrecht, M. B. Patterson, Eugene Morgan, Rev. Harry C. Robinson, E. Ray Hummel, John B. Whitehawk, Harry Z. Bostwick, Thomas H. Hennessey and E. W. McCormick. The charges contained in the petition against the first nine of these parties grow out of the criminal libel case, and might be pertinent if included in a motion for a new trial of that case, but by themselves, singly or collectively, they state no cause of action against any of said parties, and it is evident that the pleader did not intend that they should, but that his intention in making the same was to connect said parties with the

contempt proceeding and criminal libel case, which he considered the basis of his action and the source of all of his damage. As to the other three defendants who are justices of the peace, it does not very clearly appear from the petition what the purpose of plaintiff was in joining them as defendants to the petition, but it is quite certain from the provisions of Section 13496 of the General Code that the issuing of a warrant by justice of the peace is a discretionary matter and that he can not be sued in a civil action for refusing to do so. See also as bearing on this question the case of *Truesdall v. Combs*, 33 O. S., 186.

In view of all of the foregoing reasons, I am of the opinion that the petition does not state a cause of action against any of the defendants therein, and that under the circumstances, and the law, that said petition can not be so amended as to state a valid cause of action against any of said defendants.

The question therefore arises as to what disposition should be made of the motion to strike the petition from the files. A motion of that character seems to be recognized by Section 11375, General Code, and the Supreme Court in the case of *White v. Calhoun et al*, 83 O. S., 401, held it to be the proper practice in respect to a sham answer saying it "is a power existing at common law, and is one of the powers inherent in the court to be exercised in the due and speedy administration of justice." If it is applicable to a sham answer, I can see no reason why it is not applicable to a petition of the character of the one now under consideration.

The fact that some of the defendants have filed demurrers, and others answers, can not make any difference in the disposition of this motion.

The motion will be sustained and the petition stricken from the files. The motion does not cover the supplemental petition but the court will on its own motion order it to be stricken from from the files. An exception may be noted by the plaintiff.

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POSSESSION OF ILLEGAL FISHING DEVICES.

Common Pleas Court of Montgomery County.

BEN GILB, vs. STATE OF OHIO.

Decided, December, 1921.

Fish and Game—Net and Line Prohibition—Venue for Violation of—Charged with Sufficient Definiteness, When—Possession as Well as Use of Illegal Devices Ground for Prosecution.

1. The waters of a county being made a part of the Inland Fishing District of the state, an affidavit which charges violation of the fishing laws in the county by name sufficiently locates the place of the offense, and is not open to demurrer because it does not lay the venue of the offense specifically in said Inland Fishing District.
2. Possession of forbidden fishing devices within a short distance of a public stream renders the possessor liable to prosecution to the same extent as though he was actually using such devices within the waters themselves.

SNEDIKER, J.

These cases are in this court on error to the judgment of the justice of the peace of Van Buren township, where the plaintiff in error entered a plea of not guilty and was, after the hearing of the evidence, fined, in all, \$275 and costs. He was before the magistrate on three charges: One, that he had a set net in his possession; another, that he had a seine in his possession; and, third, that he had in his possession twelve floats.

For the purpose of this opinion, we need only read and refer to one of the affidavits upon which plaintiff in error was tried in the court below. They are all alike as to their formal parts. We read the one which relates to the set net. It is as follows:

“Before me, D. H. Wysong, a justice of the peace in and for the county of Montgomery and state of Ohio, personally came L. H. Monbeck, who, being by me first duly sworn, deposes and says; That he is a deputy fish and game protector of the state of Ohio, and that on or about the 30th day of April, A. D. 1921, in the county of Montgomery and state of Ohio, one Ben. Gilb did unlawfully and wilfully have in his possession one set net a device for catching fish other than

hook and line, bait or lure, and that such offense was committed in the presence of the undersigned deponent, and further affiant saith not, contrary to the statute in such case made and provided and against the peace and dignity of the state of Ohio. L. H. Monbeck, deputy fish and game protector. Sworn to before me and subscribed in my presence this 30th day of April, A. D., 1921. D. H. Wysong, justice of the peace."

Such proceedings were had that the plaintiff in error withdrew his plea of not guilty in the court below and filed a demurrer in all three cases. This demurrer is as follows:

"Said defendant, Ben Gill, demurs to the affidavit filed herein for the following reasons, because the facts stated therein do not constitute an offense punishable by the law of this state."

First as to this demurrer.

The offense which the prosecuting witness intended to charge against the plaintiff in error is defined by the terms of Section 1420, of the General Code, as follows:

"No person shall draw, set, place, locate, maintain, or have in possession, a pound net, crib net, trammel net, fyke net, set net, seine, bar net, fish trap or any part thereof, throw or hand line, with more than three hooks attached thereto, or any other device for catching fish, except a line with not more than three hooks attached thereto or lure with more than three sets of three hooks each, in the inland fishing district of this state, except for taking carp, mullet, sheephead and grass pike as provided in section 32 of this act, and except as provided in sections 29 of this act, or catch or kill a fish, in such fishing district with what are known as bob lines, trot lines, float lines, or by grabbing with the hands, or by spearing, or shooting, or with any other device other than by angling; provided, however, that in the waters of this district, except those lakes, harbors and reservoirs controlled by the state, a trot line may be used with not more than fifty hooks and no two hooks less than three feet apart by the owner or person having the owner's consent in that part of the stream bordering on or running through said owner's land.

"Each fish caught, killed, taken or had in possession contrary to the provisions of this act shall constitute a separate offense."

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The fishing districts of Ohio are located by Section 1411 of the General Code in these words:

“The waters of Lake Erie, the waters of Sandusky Bay, as far west as a straight line drawn from the mouth of Tommy Creek to Slate’s Point, and as far east as one-fourth of a mile from the mouth of the Clack Channel, and the waters of the Maumee Bay up to a point north of Toledo commonly known as Presque Isle, are in and shall be known as the Lake Erie Fishing District. All other waters over which the state of Ohio has jurisdiction, whether lakes, rivers, creeks, or reservoirs, or whether natural or artificial, including East Harbor, West Harbor, Middle Harbor, in Ottawa county, and the waters of Ten Mile Creek lying within this state are in and shall be known as the Inland Fishing District.”

The point made by counsel for plaintiff in error in support of his demurrer is, that the affidavit does not allege that the offense was committed in the Inland Fishing District.

The affidavit does charge the crime as having been committed in the county of Montgomery and state of Ohio. Making the charge in this way informs the plaintiff in error, (he by law being bound to know that by the provisions of Section 1411 the waters of Montgomery county are in the Inland Fishing District,) that the affidavit complains of his violation of the law in that district. To say, in so many words, that the offense was committed in the Inland Fishing District, would be nothing more than a repetition of the averment already made. It would be surplusage. The crime is stated and the venue is laid without it. The purpose of stating specifically that the offense was committed in the “Inland Fishing District” is, of course, to make known to a defendant (and he is entitled to know), where he is charged with having committed the act, but, as we have already said, the statement here that the thing complained of was done in Montgomery county does this.

In considering this demurrer, we may also say that plaintiff in error is not entitled to complain because the affidavit does not negative the exceptions found within the provisions of Section 1421, for the reason that these can only be ascertained by

reference to other sections of the Code therein referred to, said by Judge Wanamaker, in the Brinkman case (97 O. S., 171) :

“Had the legislature intended the exceptions mentioned to be a part of the description of the offense, the presumption clearly is that it would have included them in the statute that created the offense.”

In the case of *Hale v. State* (58 O. S., 676-686), the Supreme Court of Ohio quotes with approval the case of *State v. Miller*, (34 Conn., 522). In the last mentioned case the defendant was prosecuted under a statute which prohibited the manufacture or sale of any spirituous or intoxicating liquors “except as herein provided.” The next section contained certain exceptions. It was held the exceptions need not be negatived.

In our opinion, therefore, the court below committed no error in overruling the demurrer.

The testimony in the case showed that this set net was in the possession of the plaintiff in error at his home, near Sulphur Grove in this county; that it was there found by the officers of the law who visited his house for the purpose of making an investigation. Plaintiff in error lived about a square and a half or two squares from the river.

At the close of the evidence of the state, counsel for plaintiff in error made a motion “to dismiss the case for the reason that there is no evidence here to show that these alleged illegal devices were found in the possession of the defendant in the Inland Fishing District in the state.”

His theory in this regard was this: That only the “waters” of the two fishing districts of the state constitute such fishing districts. In other words, he contended that, because plaintiff in error did not have possession of the illegal device on or in the waters, he did not by so having it violate the law.

The old section defining the fishing districts of the state, which is found at Section 38 of the act of May 9, 1908, reads as follows:

“The waters of Lake Erie, the waters of Sandusky Bay as far up as one-half mile east of the east end of Eagle Island, the waters of Portage Bay as far up as Oak Harbor bridge, and the waters of the Maumee Bay up to a point opposite Presque

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Isle shall be known as Lake Erie fishing district of this state. All other waters over which the state of Ohio has jurisdiction whether lakes, rivers, creeks or reservoirs, and whether natural or artificial, including East Harbor, West Harbor and Middle Harbor, in Ottawa county, and the waters of Ten Mile Creek lying within this state shall be known as the inland fishing district of the state."

The difference between this section and the present one lies in the boundaries of the district and in the statement found in present Section 1411, that the waters referred to "are in and shall be known as:" while in the old section the language is "shall be known as."

It is a cardinal rule of statutory construction that the words of a statute are to be construed with reference to its subject-matter and with reference to the object intended to be accomplished by the Legislature in its enactment.

The sections which we are considering are a part of the fish and game code which was passed by the Legislature of Ohio with the purpose to protect the fish and game of the state of Ohio in the respects defined in the act. It has never been contended, so far as we are able to discover, that the old section defining the districts did not include the full territory (both land and water) comprehended in the geographical boundaries of the district. The language of the present section makes any such contention more doubtful, for the reason that the law now reads "*are in*" and "shall be known as."

The authorities are uniform to the effect that the state has the power to regulate fisheries in public streams, and to adopt appropriate means for the preservation of fish for the benefit of the people. It has not only the right but it is also its duty to so preserve, for the benefit of the general public, the fish in its waters. This was undoubtedly the object which the Legislature had in view in this legislation, and we can not conceive that the purposes of the law would be fully subserved by such a construction as would make it exclude possession by one a block and a half or two blocks away from the waters of a district and only declare that man a violator who was in the actual use of the

illegal device on or within the waters themselves. The law-making body has the same authority to prohibit the possession of these detrimental fishing appliances anywhere in the state as it has to prohibit the possession of concealed weapons, and we find that it here exercised that authority. We do not regard a strict construction of this law as requiring any such interpretation as is contended for.

This being our opinion, and the undisputed testimony showing that this plaintiff in error was in fact in possession of the illegal device or devices in this county, we find that the court below properly overruled the motion of the plaintiff in error, at the close of the evidence, to dismiss the case.

The judgments are affirmed.

GIFT TO A CHURCH BUILDING FUND NOT A GIFT TO CHARITY.

Common Pleas Court of Licking County.

IN THE MATTER OF THE ESTATE OF ANNIE E. WHITE, DECEASED.

Decided, January, 1922.

Inheritance Tax—Bequest to a Church Subject Thereto—Unless to be Used for Public Charity Only—But as to a Bequest Based on a Contract Anti-dating Passage of this Law it is not Retroactive.

1. In an appeal from an order fixing inheritance taxes, a motion to dismiss the appeal because of the insufficiency of the appeal bond of \$50 will be overruled, where no objection was made in the court below or exception entered to the amount of the bond as there fixed.
2. A bequest to a church to be used for purposes of public charity only would not be subject to the inheritance tax, but a church building is not used for charitable purposes only and a bequest to the building fund for a new church edifice does not fall within the exemptions to the inheritance tax.
3. A bequest to a church based upon a contract entered into between the testatrix and the church officers prior to the enactment of the inheritance tax law is not subject to the tax therein imposed.

J. R. Davies, on behalf of the First Baptist Church of Newark.

H. R. Smith, on behalf of the Ohio Tax Commission.

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Estate of Annie E. White.

Ralph Norpell, Prosecuting Attorney, on behalf of Licking County, Ohio.

MOORE, J.

This matter is before this court on an appeal from the order of the probate court of this county, overruling the exceptions of the First Baptist Church of Newark, Ohio, to the finding and determination of said probate court in the matter of the inheritance tax claimed to be due from said church.

A motion was made by the Tax Commission, before any testimony was offered in this court, to dismiss the appeal because it was claimed the statute relating to the perfecting of appeals in matters of this kind had not been complied with.

It appears that the probate court fixed the amount of the appeal bond at fifty dollars, which it is claimed is insufficient under the statute.

No objection was made, or exception taken to this order of the probate court in fixing the amount of the bond at the time it was made, and this court thinks this matter of the amount of the bond was thereby waived.

The facts in this case, as disclosed by the evidence, are as follows:

Sometime prior to July 2, 1917, the deceased, Annie E. White, jointly with her sister, made a pledge to the building committee of the First Baptist Church of Newark, Ohio, to pay said church the sum of \$2,250, which was to be applied towards the building of a new church edifice. This pledge was given in consideration of like pledges by others.

On July 2, 1917, the said Annie E. White took up the original pledge with the consent of said building committee, and executed and delivered to said committee in place of the original pledge, the following paper:

“\$5,000.

July 2, 1917.

“For the purpose of erecting a new church edifice and in consideration of promises for that purpose by others, I promise to pay at my death to the First Baptist Church of Newark, Ohio, \$5,000.

(Signed): “Annie E. White.”

On the same date, July 2, 1917, deceased executed her last will and testament in which she refers to this obligation to the church, and further makes said church her residuary legatee.

On the death of Miss White, and the appointment of an administrator, this paper writing was duly presented to the administrator, and was allowed by him as a valid claim against the estate and paid.

The probate court found and determined that an inheritance tax was due upon this \$5,000 from the church. Exceptions were filed by the church, and this matter is now before this court on appeal from the order of the probate court overruling these exceptions.

Three exceptions were filed. The first and third were overruled. These exceptions are as follows:

1. The \$5,000 mentioned in the second item of the will consists of a valid legal obligation entered into by the said Annie E. White with said The First Baptist Church, for a valuable consideration, and is one of the debts of her estate apart from and irrespective of said will.

3. The said church further excepts to the finding and judgment of the probate court touching said tax, because the gifts to said church are to and for the use of an institution for the purpose only of public charity, carried on wholly within this state, and are not subject to said tax.

Considering first the more general exception of the two:

The inheritance tax law, Section 5334, of the General Code, provides that the succession to any property passing to or for the use of an institution for purposes only of public charity shall be exempt from payment of the inheritance tax.

The plain language of this statute must mean, as the court views it, that if property be given to an institution, and that institution is limited to the use of such property for purposes of public charity, such succession is exempt. The institution need not be one devoted to public charity only. The institution may have many activities. The only question is whether or not the purpose for which the property is given to the institution, and the purpose for which the institution may use the

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property is a purpose or use only of public charity. This statute differs very materially from the similar exemption statute relating to general taxes. The wording of the two statutes is similar, but scarcely more than a superficial examination is necessary to disclose the difference. The general tax statute provides that all buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining and belonging exclusively to such institutions, shall be exempt from general taxes.

In the inheritance tax statute, the determining element is the purpose for which the institution is to use the property. In the general tax statute it is whether or not the institution itself is one of purely public charity.

A reading of the entire section, 5334, makes this construction all the more apparent. In this connection consider the municipal corporation clauses which is conjunctive with the institution clause, "to or for the use of municipal corporation, or other political subdivision thereof, for exclusively public purposes, or to or for the use of an institution for purpose only of public charity."

Manifestly, the construction the courts have placed upon the similar general tax exemption statute can have but little application to the inheritance tax statute.

In the case of *Watterson v. Holiday*, 77 O. S., 150, Judge Price, on page 178, says expressly that a church is not an institution of purely public charity. This case is cited by counsel for the Tax Commission; but the question in this case is not whether the First Baptist Church of Newark, Ohio, is an institution of purely public charity, or a public charity only. The question is: Did this church take this property to be used for purposes only of public charity? In other words, every gift to a church, under the inheritance laws of this State is taxable, or not, depending upon the purpose for which the church is permitted under the gift or will to use the property.

In the case at bar, the \$5,000 passed to the church for the purpose of building a new church edifice.

This court thinks that the majority of the members of our churches would resent the idea that the church buildings are to be used for the purpose of public charity only. Charity is one of the virtues taught therein, it is true, but it is only one of the many virtues and doctrines that are included in the religious and spiritual teachings of the church.

As to the third exception, the probate court is affirmed.

The first exception raises an entirely different question. Section 5332 of the General Code provides:

“A tax is hereby levied upon the succession to any property passing in trust or otherwise to or for the use of a person, institution or corporation in the following cases:

“3. When the succession is to property from a resident, or to property within this state from a non-resident, by deed, grant, sale, assignment, or gift, made without a valuable consideration substantially equivalent in money or money's worth to the full value of such property.”

And, under sub-division (b), “Intended to take effect in possession or enjoyment at or after such death.”

It is claimed that the first exception should be overruled because of the provisions of this statute.

Prior to July 2, 1917, Annie E. White, the decedent, had executed a pledge, jointly with her sister, for the sum of \$2,250. This pledge was taken up by the church when the note payable at death was executed. The first pledge was a legal obligation, collectable in a court of law by the church. The note, or contract, executed on July 2, 1917, had a consideration additional, by reason of this fact, to that recited on its face. At the death of the signer of the note, or contract, the church treated it as a vested obligation against the estate, presented it to the administrator, attached thereto the usual affidavit attached to claims presented to an administrator, who acknowledged the same and paid it. Such is the evidence in the case.

The inheritance tax law was passed June 5, 1919, nearly two years after the execution of this contract or note. The rights

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of the parties thereto were vested July 2, 1917. There is no intention apparent on the face of the law to make the same retroactive. So it was not incumbent on this court to consider whether or not the Legislature had the power to make contract obligations already vested subject to the provisions of this law. There is no such apparent intention in the law.

This is in accordance with the decision of the Supreme Court of Iowa, in the case of *Lewis v. Brown*, reported in the 116 Northwestern Reports, page 99.

The probate court is reversed as to the first exception and sustained as to the third, and the church is relieved from the payment of the tax.

LEASES PERFECT IN FORM BUT DEFECTIVE IN FACT.

RUDOLPH J. HOFFSTETTER, vs. JOHN HARRIS.*

Common Pleas Court of Franklin County.

Decided, March 18, 1921.

Landlord and Tenant—Lease Defective and Lessee Evicted—Liability of the Lessor for Loss Sustained by Reason of the Eviction—Competency of the Testimony of Witnesses to Execution of a Lease—Tendency of the Courts to Favor the Lessee.

1. Where the testimony clearly shows that the parties concerned intended to execute a lease, and the instrument which was executed proves to be a lease defective in form but perfect in fact, it is of binding force upon the parties thereto, not as a contract for a lease but as a lease.
2. Eviction of one conducting a going business under such a lease, renders the lessor liable for the earnings or profits of the business during the remainder of the term of the lease, plus expenses to which the lessee was subjected by reason of the eviction proceedings; but the value of the good will, which would have diminished until it became nothing at the end of the lease, is of too speculative a character to afford a basis for an award of damages.

*Affirmed by the Court of Appeals. November 21, 1921.

C. E. Blanchard and M. V. Kessler, for plaintiff.

Taylor, Williams, Cole & Harvey, for defendant.

SOWERS, J.

The plaintiff is suing the defendant for damages by reason of the breach of lease entered into between the plaintiff and the defendant on the 20th day of March, 1915, for a period of five years, ending on the 31 day of March, 1920. He pleads three causes of action as the bases of damages, namely:

First: He alleges that he was ejected from the premises on the 17th day of July, 1919, by action of the municipal court of Columbus.

Second: He alleges that by reason of the occupancy of said premises he had established a good will which was of value; and,

Third: That in defending in the ejectment suit in the municipal court he incurred expenses, which are a part of his damages.

Plaintiff asks a total sum of \$7,000.

The defendant in his answer admits the occupancy of the premises as claimed by the plaintiff, that a suit in ejectment was brought against the plaintiff alleging that it was brought by the Hoster-Columbus Company, Inc., and admits that the plaintiff was ejected on the 19th day of July, 1919, but denies all the other allegations of the petition.

The case was tried before the court, a jury being waived, and the testimony developed the following facts: that the paper writing attached to plaintiff's petition purporting to be a lease was executed as shown in the writing; that no rent was paid thereon after June 1st, 1919, although tendered to defendant by plaintiff, the defendant having previously given the plaintiff notice to vacate; that the defendant was a tenant by the month, in the premises occupied by him from which a part was sublet by him to plaintiff; and that the plaintiff was ejected as claimed by him in the petition. The writing shows that it was properly acknowledged by M. V. Kessler as notary public, who signed as a witness for the plaintiff and one Frank Reinhart signed as a witness for the defendant. The court is of the opinion that it was proper to admit the testimony of the witnesses as to the execution of this writing, as it is one of the primary objects in re-

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quiring witnesses that they may prove the execution of the instrument.

The testimony of Reinhart on this point was that he signed the lease in the defendant's place of business, when there were a large number of people present, but he does not identify them.

The testimony of Kessler is to the effect that the plaintiff called him to acknowledge the lease and they together proceeded to the defendant's place of business, where it was signed and acknowledged in the presence of both witnesses by both the plaintiff and the defendant, and the writing following the names of the witnesses was inadvertently made by him, being suggested by a former lease existing between the parties. It was properly recorded and no question is raised as to its validity on this account. The statute requires that a lease of real property for this length of time must be acknowledged by the lessor in the "presence of two witnesses who shall attest the signing and subscribe their names to the attestation."

The validity of the lease is attacked by the defendant upon the ground that it was not executed in accordance with the provisions of the statute. The court has examined with great care all the authorities cited by counsel for both plaintiff and defendant and while these various authorities are helpful, none of them seem conclusive upon the subject under consideration. The lease in the case at bar has two witnesses, but the writing after each name indicates for whom the witness acted. This writing is explained by Mr. Kessler in his testimony (*supra.*)

Tiffany on Real Property at Section 459 states the following principle:

"The witness need not be present at the actual signing of the instrument by the grantor, provided the latter acknowledges to him that it is his act, and expressly or implied requests him to attest the instrument."

This authority defines the latitude extended to witnesses in their attestation of conveyances.

The United States Supreme Court in a case from Michigan, found in 127 U. S., p. 326, *Culbertson v. Witbeck Co.*, in construing a similar statute speaks as follows:

“The statutes of Michigan require the attestation of two witnesses to the grantor’s signature. A deed of husband and wife was offered in evidence, the attestation to which was: ‘Signed, sealed and delivered in presence of S. W.’ for the husband; ‘W. H.R., G. H.’ for the wife; and there was a certificate that the word ‘half’ in the twelfth line was interlined before signing ‘S. W., E. W.’ E. W. Signing this certificate with S. W. was the justice of the peace who took the acknowledgment, and his certificate of acknowledgment stated that he knew the person who made the acknowledgment to be the person who executed the instrument. Held, that the execution of the deed was proved, and it was properly admitted in evidence.”

This authority is valuable in that it gives a construction of the apparent defect favorable to the validity of the deed. In the case of *Lydiard v. Chester*, 45 Minn., p. 277, the court in discussing a defective deed, say that, “the deed offered in evidence (by the grantee) was sufficient to pass title to the real property therein described, without regard to a defect, real or pretended, in the matter of its acknowledgement.”

Again the same court in the case of *Roberts v. Nelson*, 65 Minn., p. 540, say that the adding of the name of a witness and a certificate of acknowledgement only go to the probative force of the instrument.

In the case of *Kittle v. St. John*, 10 Neb., 605, the court say:

“Action for rent of a warehouse and lumberyard. Plaintiff offered in evidence a lease executed by plaintiff to defendant, witnessed, but not acknowledged or recorded, whereby the plaintiff demised the premises to the defendant for the term of five years at a rental to be paid quarterly in advance. Lease excluded by district court for the reason that it was not recorded. Held to be error, for which a new trial must be awarded.”

The court in its opinion quotes Kent’s Commentaries as follows:

“By the law of every state in the Union, all deeds and conveyances of land, except certain chattel interests, are required to be recorded, upon previous acknowledgment or proof. If not recorded, they are good, and pass the title as against the grantor and his heirs and devisees, and they are void only as

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to subsequent *bona fide* purchasers and mortgagees whose deeds shall be first recorded.”

The court in its examination of the law has had occasion to examine other authorities which have had under consideration a similar or analogous question; among them being, *Baldwin v. Johnson* 21 Conn., 168; *Johnson v. Ins. Co.*, 46 Conn., 92; *Downs v. Yonge*, 17 Ga., 295; *Gardner Dexter & Co. v. Moore, Trimble & Co.* 21 Ga. 268;; *Johnson v. Jones*, 87 Ga. 85; *Weaver v. Coumbe*, 15 Neb. 167; *McGlaulin v. Halmian*, 1 Wash. 239.

The particular value of the authorities which are given here, is that they show the very marked tendency of the courts in upholding the validity of instruments of this character and giving them a construction favorable to the lessee rather than the lessor.

Our Supreme Court held in the case of *Johnson vs. Turner*, 7 O. (part 2) p. 216, that a deed signed by two witnesses, one of whom was incompetent, was valid; and in the case, *Garretti v. Garrett*, 53 O. S. p. 482, that its execution might be proved by one or more of the subscribing witnesses or the officer before whom the acknowledgment was made; and in *Building Co. vs. Watt*, 96 O. S. 74-84 the court say:

“A defectively executed instrument, either a lease or a deed, when made by the owner, may be enforced against him as a contract to make a lease or deed for the reason that it is his contract.”

The circuit court in the case of *Uebbing vs. Koester, et al.* 14 C. C. (N. S.) 553, 554, say that the deed in question was perfect in form, but admittedly defective in fact, and thereupon held it valid to support the construction of a will, and was enforced in accordance with the agreement of the parties.

In the case at bar, the lease is apparently defective in form but perfect in fact. There can be no doubt that the parties intended to execute a lease for five years, and it must naturally follow, giving full weight to the testimony, that it is valid as such an instrument and binding upon the parties thereto,

not as a contract for a lease but as a lease, and the court so finds.

The question of damages does not present nearly so difficult a problem for solution, although generally such a question may be answered more satisfactorily for the parties by the judgment of a jury than by a court. The evidence shows, and it is undisputed, that this place of business was earning \$260 per month and there is no reason to believe that it would have earned less than this amount for the remaining months of the lease, namely, from July 17th 1919, to March 31st 1920, and judgment is awarded accordingly. The defendant should also pay the expenses incurred in the ejectment suit in the municipal court.

The plaintiff claims damages for loss of the good will which he had established in the business and also damages for loss of the profit in his wholesale business on goods which he would have sold through this retail business.

Whatever value he may have established in the good will of the business, it was a constantly decreasing asset the more nearly the termination of the lease approached, until its value would have been *nihil*; and just when such a time would arrive is too speculative for the court to attempt to fix, and therefore no allowance is made on this item of plaintiff's claim. Upon the other claim of plaintiff, namely, profit in his wholesale business, it is not unlike the loss asked on account of good will. As a customer, the retail store would have purchased less and less as the end of the lease approached, and it is reasonable to suppose that if he did not make a wholesale profit on this retail store, he made the same profit upon some other customer of his wholesale business, and there is no evidence to show that there was any diminution either in his wholesale business or in his profits from the wholesale business by the closing of the retail store.

The court has, therefore, reached the conclusion that no allowance should be made on this last item of plaintiff's claim.

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CONSTRUCTION OF THE WORD "PAROCHIAL" AS APPLIED TO CATHOLIC SCHOOLS.

Common Pleas Court of Hamilton County.

THE CITY OF CINCINNATI, ETC. v. THE CINCINNATI TRACTION COMPANY, ETC.

Decided, November 28, 1921.

Schools—Reduced Street Car Fare Ordered—For Pupils of the "Public" and "Parochial" Schools—Other Catholic Schools Held to be Included—Words and Phrases.

An ordinance requiring that children between the ages of ten and eighteen years, attending regularly established "public or parochial" schools, shall be carried on the traction lines to and from such schools for a five-cent fare, must be construed in view of its beneficent purpose to include children in attendance at the academies and the convent schools and high schools maintained by the Catholic church.

Saul Zielonka, for the motion.*Müller Outcalt, A. C. Cassatt and Joseph Wilby*, for defendants.

DARBY, J.

A motion for a temporary restraining order was submitted upon evidence and briefs. The petition seeks to require the defendant to furnish and supply a reduced rate street car fare to school children attending certain so-called convent schools and high schools operated in this city by the Roman Catholic Church.

The ordinance of the city which is involved is No. 142—1921, the third section of which provides:

"The rates of fare for children ten (10) years of age or over and under eighteen (18) years of age, attending the public and parochial schools, including high schools, shall be five (5) cents, under rules prescribed by the company and approved by the director of street railroads, providing that such rate of fare shall be effective only by the sale of tickets and making such further provisions as may be necessary to limit the use of such reduced rate tickets to *bona fide* school children going to and from the regularly established public or parochial schools for the purpose of attending school."

The testimony offered on the hearing tended to show that the convent schools referred to have courses of study practically the same as elementary, intermediate and high school courses in the public schools of the city; that the attendance at such schools is accepted in lieu of attendance at the public schools; that such schools are auxiliary to the so-called parochial schools; that they are maintained in part by tuitions in the nature of donations and in part by contribution from the parishes; that such convent schools are attended by children at large, that is, from any of the parishes of the city of Cincinnati; that the Catholic church has a policy of separating the youth after their arrival at twelve or thirteen years of age and of giving the girls, high school training in the convent schools, and the boys their high school training in certain designated high schools conducted by the Catholic church.

There was further testimony to the effect that the term "parochial schools," as used and understood by the Catholic people or congregations is synonymous with Catholic schools, and includes the convent schools referred to; also, that said convent schools are not conducted for profit, but are supported and maintained "by the public at large, the Catholic public at large and serve the public at large, whether Catholic or non-Catholic and are not maintained for private gain in any sense of the word."

It was conceded on the trial that the generally accepted meaning of the word parochial is, "of, or pertaining to a parish." But the testimony given by the witness, Dr. Nau, is to the effect that the word is used and understood in the Catholic church and among Catholics as having a broader sense than that, when applied to schools, and that it is understood by them to mean "a school conducted under or by the Catholic church."

The question in the case is as to the meaning of the council in passing the ordinance referred to. The ordinance fixes the rate referred to for children of the ages designated, "attending the public and parochial schools, including high schools." Did council in the use of this language intend that this beneficent law should be limited in its operation to such children attending the parochial or parish schools, strictly speaking, or was it the

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intention to include children attending the schools in question, which are said to be auxiliary, or aids to the parochial schools? The court has no power or inclination to extend the effect of the language referred to beyond the intention of the legislative body. The only cases referred to as throwing light upon the construction of such ordinances, justify a broad construction of their terms. *In re Public Service Rwy. Co.*, Public Utilities Rep., 1916a, 437; *Oklahoma Ry. Co. v. St. Joseph's Parochial School*, 127 Pac. Rep., 1087. *In re Lincoln Traction Co.*, Public Utilities Utilities Rep., 1920a, 328.

The Legislature of this state has employed this term "parochial school," in a manner indicating something more than a local elementary or intermediate school.

It is provided (General Code, Section 7763, 109 O. L., 378) that—

"Compulsory school age shall mean six to eighteen years of age, except," etc.—;

also, (General Code, Section 7762-6), that—

"Every child of compulsory school age who is not employed on an age and schooling certificate, *shall* attend a public, private or parochial school," etc.;

also (General Code, Section 7763), that—

"Every parent * * * having charge of any child of compulsory school age who is not employed on an age and schooling certificate, *must* send such child to a public, private or parochial school for the full time the school attended is in session," etc.

The evidence (and general knowledge) is that in the parish schools, strictly speaking, elementary and intermediate courses are taught, and that the high school courses are taught at the convents mentioned and high schools maintained by the Catholic church. It is required that children above the ages for elementary and intermediate grades shall go to school under the statutes referred to. All children of compulsory school age may go to parochial schools, and by the plainest meaning of the Legislature they are not required at any time during their school age to go to public or private schools, but may go to parochial

schools. The statute plainly forbids the suggestion that after a child of compulsory school age has completed the course in elementary and intermediate grades in the parochial school, he must then go to some other school public or private. If the term "parochial school" is to be limited to mean a local parish school, then the inconsistency would arise of requiring children to continue until eighteen years old in the parish schools, though they had years before that age completed the full course of instruction there. The Legislature by the acts referred to had something more in mind in the use of the term "parochial school" than the mere local elementary and intermediate school. It may be that the Legislature did not have in mind that parochial and Catholic school were synonomous terms, but it surely did mean by the use of the term that children of school age might attend the local parish schools or some school which is equivalent or a continuation of such local school and maintained, conducted and controlled in the same manner in which the local parish schools are maintained and conducted.

After the most careful consideration the court has reached the conclusion that, the intention being beneficent and in aid of education, council intended by the ordinance in question that the children attending the parochial schools strictly speaking, and those which are auxiliary to them, including the convents, should receive the benefit of the reduced fare. The fact that the convents are not maintained for private gain, but are maintained as heretofore stated, aids in reaching the conclusion stated.

A temporary restraining order as prayed for may be entered requiring the defendant to furnish and supply tickets in accordance with the ordinance and rules, to children between the ages of ten and eighteen years attending the academies known as Notra Dame, the Ursulines, Sisters of Mercy, Sacred Heart of Clifton, Cedar Grove, and the High Schools for Boys enumerated in the testimony, who are attending said schools and receiving instruction in elementary, intermediate and high school courses.

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**WARRANTS FOR SEARCH AND SEIZURE MUST BE STRICTLY
CONSTRUED.**

Municipal Court for the City of Columbus.

THE CITY OF COLUMBUS V. JOHN BUEHLER *

Decided, March 16, 1921.

Search Warrants—Must Specify with Exactness the Persons and Property Covered—John Doe Warrants not Available in Cases of Violation of Liquor Laws—No authority or Discretion Vested in Officer Serving the Warrant Beyond that Specifically Stated.

1. A search warrant, issued under the Crabbe and Miller acts and authorizing officers to enter residences and business houses for the purpose of searching for and seizing intoxicating liquor illegally manufactured or obtained, must be issued by a proper officer and be based upon an affidavit which states specifically the place to be searched, the person to be seized and the things to be sought, and that the affiant believes and has good reason to believe that the things sought are there concealed; the warrant with the affidavit annexed must be directed to an authorized officer; the search must be made in the daytime unless there is urgent necessity that it be made at night; the search must be limited to the building or room specified in the affidavit, and to the person or persons therein named; and the goods seized must be limited to those set out in the warrant, regardless of the fact that other goods of the same character are found during the search.
2. A warrant for search of the premises of and the arrest of E does not authorize the officer to proceed with the search upon learning that the present owner is B. His only recourse is to procure a new warrant for search of said premises with B named as the owner and person subject to arrest.

Paul M. Herbert, on behalf of plaintiff.

Don W. Hamilton, on behalf of defendant.

OSBORN, J.

This question comes up on demurrer filed by the defendant, Buehler, and assigning among other various reasons set forth the principal one that the search warrant on which the officer

*Error not prosecuted.

secured the evidence and made the arrest was not valid, and that the officer was not authorized by law to serve it or go upon the premises of John Buehler or to search his premises.

As there have been motions in similar cases filed attacking the use and validity of the search warrant, it is deemed proper that the court take up the whole question of the operation and the validity of a search warrant. A search warrant is generally defined to be an order in writing in the name of the state, signed by a magistrate and directed to a peace officer, commanding him to search for personal property and bring it before the magistrate.

The danger of the search warrant has been so clearly apprehended that it has been found necessary to have it surrounded by constitutional provisions, and the different states have also found it necessary to enact statutes governing the same.

It is what would be called in law an extraordinary proceeding, and it is a very serious measure and a very effective one when used in the proper manner; on the other hand, if it is not served as is prescribed by law it is a very dangerous measure, for the reason that it attacks the very liberty and freedom of every citizen in what is the most sacred of his possessions, his home.

1. Our state has provided the proper way that a warrant should be issued and served. It provides, in the first place, that this warrant may be issued by a justice of the peace, mayor or police judge and has enumerated the different kinds of property for which such warrants may be issued.

In this case the statutes known as the Crabbe and Miller acts have provided that officers may enter residences and business houses for the searching and seizing of liquors illegally manufactured or obtained.

2. The statute provides that this warrant shall not be issued until there is filed with the magistrate an affidavit particularly describing the house or place to be searched, the person to be seized and the things to be sought, and further that affiant

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believes and has good cause to believe that such things are there concealed.

3. The warrant for search shall be directed to the proper officer and by a copy of the affidavit inserted therein or annexed or referred to shall show or recite all material facts alleged in the affidavit and particularly describe the thing to be searched for, the house or place to be searched and the person to be seized, and furthermore that it shall be made in the day time unless there is urgent necessity of search in the night, in which case a search in the night may be ordered.

Taking up the statute in detail, in the first place, our code has provided that this affidavit for search warrant may be filed with the clerk of police court and that he shall have the power to issue warrant under seal of said court and arrest the accused or search the house described.

The warrant must particularly state the place to be searched. In other words, if this warrant states that one room may be searched, then that is the only place that can be searched. An officer has no right to search a whole house when the warrant only calls for him to search one room. Furthermore, if this warrant orders him to search a certain house it does not mean that he can search any other buildings adjacent to this property, although he might learn that the articles that he is searching for would be in this other building. It would be necessary for him to get a new search warrant for that building in order for him to search for and seize those goods.

Another question that arises is the right of officers to search the persons or the occupants of a room. Unless the warrant states the names of the persons to be searched, the officers have no right to search any person or persons that may be in the place at the time the warrant is being served.

4. One of the principal questions that arises in this case is as to the name of the person in the search warrant. There have been some warrants issued in which the name of the person was not known to the officer and the name John Doe was substituted. In my opinion this was one of the very reasons that the statute

clearly sets out that the name of the person shall be in the warrant, to prevent the use of the name of John Doe, which in legal parlance is always used when the real party in interest is not known.

The continuance of the use of the name John Doe would lead to too many abuses and as the statute provides that the exact name must be set out any other method would be in violation of law.

5. Only the goods that are set out in the search warrant can be seized; no matter if the officer sees other goods there in violation of law he would have no right to seize them because he is going there and acting under authority of the warrant that he has and he can not go beyond what that warrant states.

6. The officer serving the search warrant must serve it at reasonable hours; he can not get it and serve it in the night season unless he makes a proper showing to the magistrate, or in this case the clerk of the police court, that a certain necessity arises where it would be impossible to serve the warrant in the day time; and in order to serve it in the night time he must make it very clear to the officer who issues the said warrant.

In the case at bar the officer who swore to the search warrant says that he believed and had good cause to believe that a Mrs. B. Evans possessed certain liquor; but when he arrived there instead of searching the premises of Mrs. B. Evans he arrested John Buehler whom he claimed was the present owner of the place. Under the statute as laid down and as has been expressed here, it was the duty of the officer to have returned and procured a search warrant for the residence of John Buehler, because he was the person sought to be arrested and the officer had no right to search the premises of John Buehler when the warrant specifically said the residence of Mrs. B. Evans. An officer has no right to enter a residence without having a warrant authorizing him to enter that residence. As the court has just stated the search warrant is one of the most important implements that is used in the furtherance of justice, and if not used in the proper way is liable to be greatly abused and when

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it is so abused it infringes upon the most sacred rights of our citizens, whether it is used in a residence or a business place. Therefore the warrant must be construed strictly. Every particular must be set out as is provided in the statute.

**RIGHTS UNDER THE COMPENSATION LAW OF AN INJURED BOY
SIXTEEN YEARS OF AGE.**

Common Pleas Court of Clark County.

ROBERT HARTLEY V. THE VICTOR RUBBER COMPANY.

Decided, December, 1921.

Boy Injured in Course of His Employment—Waives Right of Action Against his Employer—By Collecting from State Insurance Fund—Employer may Set up Defense of Fraud and Misrepresentation as to Age of Minor Injured in His Employ—Construction of Amended Section 1465-93 of the Workmen's Compensation Act.

1. A minor, sixteen years of age, employed by an employer who has complied with the provisions of the workmen's compensation act, and injured during such employment, is now within the provisions of the act, and if he has made application to the industrial commission for an award out of the state insurance fund, in compensation of his injury, and has been paid under the provisions of such act, he has thereby waived his right to bring an action at law against his employer.
2. The case of *Acklin Stamping Company v. Kutz*, 98 O. S., page 61, based upon the statute then in force, does not apply to the case at bar, by reason of the fact that the provision of original Section 1465-61, "who are legally permitted to work for hire under the laws of the state," has been eliminated from the definition of an employed minor, by amendment. (April 17, 1919, 108 O. L., 316.)
3. Such minor even though employed contrary to the provision of the law in reference to the employment of minors, is now deemed *sui juris* for all purposes of the act under the amendment of Section 1465-93 (108 O. L., 324), and as such is competent to elect to receive compensation from the state insurance fund, and having so elected, waives his right to bring an action at law.
4. The employer may set up as a defense any fraud or misrepresentation made by such minor employee, as to his age, even though

he may have been employed contrary to the provisions of any statute of the state, and if such misrepresentation is proved the defense of contributory negligence becomes available.

Johnstone & Lorenz, for plaintiff.

J. E. Bowman, for defendant.

GEIGER, J.

Plaintiff, an infant, brings an action against the defendant to recover for damages from which he is alleged to have suffered during his employment in the defendant's factory.

It is alleged that the defendant operates a factory and regularly employs five or more workmen; that on the 3d day of May, he entered into a *contract of employment* with the defendant, by the terms of which the plaintiff was employed to operate a certain press; that at the time he was so employed the defendant was informed that the plaintiff was a minor of the age of 16 years; that by the terms of the employment, notwithstanding knowledge of plaintiff's age, plaintiff was required to operate the machine between the hours of 5 o'clock p. m. and 5:30 o'clock a. m., and required to work from 60 to 62 hours per week; that the press upon which the plaintiff was required to work, was designed to roll rubber under great pressure; that as a part thereof there were a number of gears and cogs; that the defendant is the owner of a shop within the meaning of Section 1027, G. C. and was negligent, in that it intentionally failed to construct guards on said gears or cogs, or to enclose the same as required by law; that it was negligent in that the safety device was out of order and did not work to prevent the accident, and that portions of the press were not working properly; that plaintiff was injured by being caught in the unprotected cogs at a time when he was being employed in the defendant's shop in violation of the statute governing the employment of infants of the age of 16.

It is alleged that the plaintiff, by reason of the unlawful acts of the defendant, was injured to his damage in the sum of \$25,000.

Defendant answers, and as a first defense alleges that at the date in question, and for a year prior thereto it was, and since

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said date has been a corporation having in service under contract five or more workmen regularly employed in the same business, and during that period has complied with the provisions of Section 1465-69 G. C., and has duly paid into the State Insurance Fund all premiums required.

Defendant further says that after his injury the plaintiff, on the 4th day of June, 1921, made application to the Industrial Commission for an award out of the State Insurance Fund in compensation of his injury, and on said application was paid the sum set out in detail, and on the 8th of August, as a permanent partial award was awarded the sum of \$2400.00, payable at the rate of \$12.00 per week, beginning August 15th, 1921.

As a third defense, the defendant repeating the allegations of the first defense, says that in the application for compensation plaintiff stated he was 19 years of age, and that at the time of his employment he represented to the defendant he was 19 years of age, upon which representation the defendant relied, and as consequence thereof gave him employment, which it would not otherwise have done; that the injury of plaintiff was directly due to his own contributory negligence, and that he assumed the risks of his employment.

A demurer is filed to the first and third defenses set forth in the defendant's answer, for the reason that they are, on their face, insufficient to constitute a defense to the cause of action alleged in the plaintiff's petition.

The question, as to the first defense, is: does the fact that the defendant had complied with the Workmens Compensation Act, and the plaintiff had received from the State an award under the act, constitute a defense to the action?

It is urged by the plaintiff that it does not for the reason that the relation of employer and employe did not exist between plaintiff and defendant, and that the provisions of the Act do not apply by reason of the violation of Sections 12993 and 12996 relating to the employment of infants.

It is claimed by the plaintiff, that the employment was illegal

and therefore there was no relation of the employer or employee, because he was engaged in the employment beyond the hour of 10 o'clock p. m., and for more than 54 hours per week, and that consequently the defendant was not protected by the provisions of the Compensation Act.

The case of *Acklin Stamping Company, v. Kuntz*, 98 O. S., 61, relates to a minor 15 years of age, and holds that if the relation of employer and employe does not exist, the provisions of the act have no application, and that a minor who is employed in violation of the statute enacted for the protection of children is not an employe within the meaning of the term, as used in the act, and as designated in Section 1465-61 G. C.

The Acklin decision referred to an accident occurring on June 28th, 1916, at which time the statute then in force was 1465-61, O. L., 103, 77, which provided that the term employee workman and operative, as used in this Act, shall be construed to mean, "every person in the service * * * under contract for hire, express or implied, oral or written, including aliens and also including minors *who are legally permitted to work for hire under the laws of the State*.. The same provision was carried in the act passed March 20, 1917, O. L. 107, 159. The decision in question was rendered April 2d, 1918. The act as amended April 17, 1919, O. L., 108, 316, provides that the following shall constitute employers subject to the provisions of this act * * * every person in the service of any person, firm or private corporation under any contract of hire, express or implied, oral or written, including aliens and minors."—omitting the former provision as to minors, "who are legally permitted to work for hire under the laws of the state."

Under the act in force at the time of the accident described in the Acklin case, Section 1465-93 O. L. 103, 89, provided that a minor working at an age legally permitted under the laws of this State, shall be deemed *sui juris* for the purposes of this act. * * *

The amendment of this section (April 17, 1917, O. L., 108 324), provides that a minor shall be deemed *sui juris* for the

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purpose of this act, leaving out the portion of the original act "working at an age legally permitted under the laws of this state."

The question is, is the holding of the Supreme Court in the Acklin case modified by the amendments of the two sections, as pointed out.

Newman, J., says, on page 69:

"The test is, was the employment of a minor in the given case, illegal? If there has been, on the part of the employer a violation of the statutes of this State, enacted for the protection of children, the employer cannot avail himself of the provisions of the workmen's compensation act."

Counsel for plaintiff insist that notwithstanding the change in the statute, if the minor were illegally employed to perform services, either of a nature or of a duration that is prohibited by the statute, there was no valid contract of employment, and therefore that no relation of employer and employe existed and that as a consequence, under the Acklin case, the Workmen's Compensation Act has no application; from which it would follow that even if the minor applied for and received compensation he could not thereby bring himself within the provisions of the act, in as much as no act upon his part in applying for compensation, could make the relation of employer and employe exist where the employment is prohibited by the statute.

In the Acklin case, the court bases its decision upon the fact that the definition of an employe included minors "who are legally permitted to work for hire under the laws of the state."

Almost immediately after the decision in this case, this provision was eliminated from the statute in reference to both Sections 1465-61 and 1465-93, General Code.

It is evident there was some purpose in the amendment. The court had especially declared that a minor who was permitted to work at some employment, was not within the provisions of the act if he was not eligible for employment in the work or occupation in which he was engaged at the time of his injury

The omission of the provision upon which the court based its

decision, must certainly have been intended to avoid the effect of the decision, which was to exclude from the benefits of the act a minor, who, while otherwise eligible to employment, was not eligible for the employment in which he was injured.

The Acklin case at once impresses one that it is unfair to a minor to exclude him from the benefit of an act which is conceded to be favorable to adult employees. The act was passed for the benefit of the laboring man, and a minor employee was excluded from its benefits by virtue of the clause which the legislature repealed at an early date after the announcement of the opinion.

The conclusion seems almost inevitable that the legislature intended to include within the provisions of the act, minors who were employed and injured by such employment, irrespective of whether or not they could be legally employed in that particular employment.

It is within the knowledge of all, and a daily occurrence, that minors are employed in occupations for which they are technically ineligible.

It is not illegal for a minor to receive employment, but it is illegal for the employer to engage him in an employment prohibited by the statute. The minor has done no wrong by accepting the employment, and the legislature, quick to see this situation, provided that he should have the benefits of the Act, even though he were engaged through the illegal act of the employer. Having the benefit of the act, the next question is, must he be bound by its provisions? It is claimed that the plaintiff being a minor cannot make a valid election.

Section 1465-93 provides that a minor shall be deemed *sui juris* for the purpose of the act, under the assumption that if he is old enough to work, he is old enough to receive the benefits of the act, and to be bound by its provisions.

Section 1465-70 provides that employers complying with the act, shall not be liable in damages at common law or by statute, save as afterwards provided, for the injury of an employe.

Section 1465-76 provides where an employer has failed to comply with any lawful requirement for the protection of em-

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ployees, then nothing in the act shall affect the civil liability of the employer, and such employe may, at his option, claim compensation under the act or institute proceedings for his damages on account of the injury, and in such event defendant shall be entitled to plead the defense of contributory negligence and the defense of the fellow servant rule, and further, that every employe who makes application for an award or accepts compensation from an employer, waives his right to exercise his option or institute proceedings in any court, and that every employe who exercises his option to institute proceedings in the court, waives his right to any award under the provisions of Section 1465-69.

It seems to the court to follow, that a minor, though he be employed in an occupation which is illegal, falls within the provisions of the compensation act, as now amended, and that he is *sui juris* though a minor, and that he is bound by the provisions of Section 1465-76, in that if he makes application for an award, he waives the right to exercise his option to institute proceedings in the court, and it must therefore follow that the first defense, which sets up the fact that he did make application, and did receive compensation, is a good defense.

The third defense, which is demurred to, repeats the allegations of the first defense, and states that the plaintiff represented that he was 19 years of age, upon which representation the defendant employed him, and alleges that his injury was due to his own negligence, and that he assumed the risks of his employment.

Section 6245-2 provides that in all actions where a minor employee has been employed or retained in employment contrary to any statute of the State or United States, such employe shall not be deemed, or held to have been guilty of contributory negligence, or to have assumed of the risks of his employment.

But the statute further provides that the employer may show by way of defense, fraud or misrepresentation made by such employee.

The defense sets up the mis-representation alleged to have been made, in that the minor represented himself to be 19 years of age, on account of which representation he was employed by defendant.

The burden of proving the allegations of mis-representation, is upon the employer. If the evidence shows that there was fraud or mis-representation on the part of the employee, as to his age, the defense of contributory negligence would then be available. *Acklin Stamping Co. v. Kutz*, 98 O. S. 71.

The defendant having plead mis-representations on the part of the minor, such defense if proved, permits the defendant to show contributory negligence on the part of the plaintiff and the demurrer should therefore be overruled.

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Delays in completion of the work; question of damage from delay one for the jury; controversy as to whether contractor acted fairly in making deductions. 336.

BUILDING—

An emergency ordinance establishing zones is a valid exercise of the police power of a municipality. 549.

BURDEN OF PROOF—

The burden is on an employee to show that the breach by his employer of a contract of employment was for some reason other than dissatisfaction with his services. 450.

CANALS—

Leases in Cincinnati for surplus water were mere licenses, and abandonment of a portion of the canal terminated water rights in that portion. 257.

CHARGE OF COURT—

The stating in the general charge of rules of law already included in a special charge, but without referring to the special charge, is not error where no special theory of the evidence is em-

phasized, and the law favorable to the respective parties is given with equal prominence. 553.

In an action by an employee for breach by his employer of a contract of employment. 450.

CIVIL SERVICE—

Vacancies in the classified service where peculiar and exceptional qualifications are required and competition is impracticable and the position can best be filled by the selection of some distinguished person in the line involved, must be filled by the commission itself and not by delegated authority. 345.

COLUMBUS—

Charter of the city construed with reference to the provision that objection to a street assessment on the ground that it is excessive must be made within two weeks. 323.

CONSIDERATION—

Inadequacy or want of consideration for entering into a trust agreement is immaterial, where the trust is voluntary and executed. 425.

Not necessary to relinquishment of a personal right. 481.

CONSPIRACY—

Is not ground for a private suit unless something is shown to have been done independent of the conspiracy which resulted in damage to the plaintiff. 558.

An action can not be maintained against a group of judges, jurors and other judicial officers because of humiliation and injury resulting from an alleged illegal prosecution and commitment to jail on charges growing out of contempt and criminal libel proceedings. 558.

CONSTITUTIONAL LAW—

The provision of the Cincinnati occupational tax ordinance of a fine and imprisonment for failure to pay the tax assessed is not in violation of the constitutional in-

hibition against imprisonment for debt. 113.

An act establishing a municipal court is a special grant of legislative power on a particular subject, and in no way contravenes the constitutional requirement that all laws of a general nature shall have uniform operation throughout the state. 393.

The Miller law takes precedence over laws creating municipal courts in so far as its terms are in conflict with such laws. 393.

A city ordinance making it unlawful to manufacture, sell, furnish or give away intoxicating liquors for beverage purposes is a valid enactment and constitutional. 166.

The withdrawal of a case from the jury with judgment for defendant for failure of proof on some essential averment, does not involve a constitutional right, and such a case can be taken to the Supreme Court only upon an order of the Court of Appeals that the record be certified. 1.

Constitutionality of the Cincinnati smoke abatement ordinance when applied to steamboats engaged in interstate commerce on the Ohio river. 1.

The Constitution of Ohio permits an increase during incumbency of that part of the salaries of common pleas and superior court judges which is paid by the counties or municipalities. 485.

Section 2252, providing for such increase, is a valid act and applies to incumbents as well as those elected after its passage. 485.

Application of the rule of reason to the common welfare. 485.

Section 5437, exempting from taxation bonds deposited by foreign insurance companies for the protection of Ohio policy holders is a valid enactment. 329.

A city ordinance which prohibits begging, whether by words, the exhibition of a sign, or by gesture or by singing, is not in conflict

with Section 1, Article I, of the Bill of Rights or the Constitution. 372.

Such an ordinance is a proper exercise of the police power under Section 3, Article XVIII of the Constitution. 372.

A municipal ordinance placing restrictions on the employment of guards during industrial disturbances is an invalid enactment. 65.

CONTEMPT—

Power of a notary taking depositions to commit for contempt. 19.

Action for malicious prosecution on account of commitment to jail for contempt. 558.

CONTRACTS—

An agreement entered into by one person with another for the benefit of a third can be enforced by the third person in his own name where based on a valid consideration. 465.

Whether the rescinding of the contract (induced by false representations) was without unreasonable delay held to have been a question for the jury. 473.

Validity of a contract for performing janitor service in public school buildings. 409.

Division of profits to the disadvantage of certain stockholders is equivalent to the declaration of a dividend in which an omitted stockholder was entitled to participate; corporation estopped from setting up inequality of division as a defense to its treatment as a dividend. 81.

Acquiescence of stockholders in informal acts of its directors cures the irregularity. 81.

CORPORATIONS—

Right of creditors to recover the difference the actual and alleged inflated value of property purchased by the corporation with fully paid up stock. 77.

Agreements between stockholders are not a matter of public con-

cern where not against public policy; voting rights subject to such agreements. 193.

A sale of corporate property, not including book accounts, notes and leases, does not constitute a sale of the "entire property and assets." 193.

Actions by foreign corporations brought in this state; capacity to sue. 209.

One injured by a motor truck belonging to a corporation, having its principal place of business in another county may sue in his own county and cause summons to be served in such other county. 422.

In an action against a corporation the venue is the place where the corporation or its principal office or place of business is found, or where any of the officers named in the statute may be summoned. 486.

In actions against corporations other than railroads service must be had on some officer who has and exercises corporate power with authority to act for the corporation in its corporate capacity. 486.

When officers and employees of, become criminally liable for creating a nuisance. 1.

COUNTY COMMISSIONERS—

Right to contest which of the three candidates at the election of 1920 shall be given the long term. 250.

COVENANTS—

A purchaser may rely upon express covenants and is not affected by false covenants, notwithstanding opportunity was at hand to ascertain the truth as to the title. 361.

A covenant not to sue a city contractor for negligence is available to the city. 222.

COURTS—

Exceptions to decisions made during trial or to judgment entries embodying such decisions. 489.

Increase of the salaries of judges during incumbency permissible in Ohio. 485.

Municipal courts are special grants of legislative power; a general law takes precedence over such an act in-so-far as its terms are in conflict with such act. 393.

The probate court is without authority to withdraw consent to a settlement for wrongful death. 140.

CRABBE ACT—

Sections 6 and 9 of this act repeal Section 38 of the municipal court act applying to the city of Portsmouth, and a justice of the peace outside the limits of that city has jurisdiction in a prosecution under the Crabbe Act. 533.

CRIMINAL LAW—

See EMBEZZLEMENT.

Nature of the offense of a parent who causes his child to be excluded from school, and thus deprived of school advantages, because of refusal to permit him to be vaccinated. 129.

Prosecutions for manufacturing, selling, possessing or giving away of intoxicating liquor; jurisdiction in such cases. 393.

An affidavit which charges the sale of a scandalous publication must state what therein contained is indecent or likely to create a breach of the peace. 393.

Justices of the peace serving in Franklin county outside of the city of Columbus are without jurisdiction to try criminal cases within said city. 477.

A conviction can not be reversed because against the weight of the evidence unless manifestly so. 166.

Prosecution of error to the municipal court in criminal cases. 500.

Prosecutions for violation of the fish and game laws. 569.

A judgment rendered in a criminal case without the intervention of a jury is to be treated on review as to the weight of the evi-

dence under the same rules as apply to a verdict by a jury—that is it can not be reversed unless manifestly against the weight of the evidence. 273.

A judgment will not be set aside merely because of an apparent conflict in the evidence. 273.

The phrase “in violation of law” includes a constitutional inhibition. 273.

Prosecution for selling and keeping a place where intoxicating liquors are sold. 273.

CROSSINGS—

Appropriation for a grade crossing does not lie where the evidence does not show that the extension of the proposed street would be of much public benefit, but rather would create a dangerous way for those using it as a matter of convenience rather than of necessity. 161.

Policy of the state with reference to new grade crossings. 161.

Stopping, looking and listening at a railway crossing must be done at a point where a view of the tracks can be had. 255.

DAMAGES—

In an action for damages the defendant may plead in bar a settlement made with the consent of the probate court. 140.

Disposition of a check deposited as liquidated damages in case of default of the drawer of the check with reference to compliance with the terms of a bid submitted by him. 145.

A wrong-doer can not escape liability on the plea that the injured party has been indemnified by a third person. 206.

DECISIONS—

Distinguished from orders and judgments. 489.

DEFENSES—

Defense of payment by an insurance company of all the damages sustained; subrogation. 206.

The defense of fraud and misrepresentation may be made by an employer in the case of an injured infant employee who it has developed is under age but has practiced deception as to that fact. 593.

DEPOSITIONS—

Refusal of a witness to answer questions propounded by a notary is not necessarily contempt; power to commit limited to refusal to answer proper questions or to produce papers competent as evidence. 19.

DISCRETION—

Of a trial judge may be exercised as to receiving the testimony of a witness who has disregarded an order for exclusion of witnesses from the court room. 273.

DISTRIBUTION—

Determination of the period for under the terms of a will. 505.

DIVORCE AND ALIMONY—

Where the plaintiff has not been a resident of the county for the thirty days immediately preceding the filing of the petition, an allegation is necessary that the cause of action arose in the county in which the suit is entered. 483.

Verification of the petition does not preclude plaintiff from introducing evidence to the effect that she was a *bona fide* resident of the county during the thirty days immediately preceding the filing of the petition. 483.

DOWER—

Can not be reduced or the right thereto destroyed, but is paramount to contracts entered into by the husband; inchoate dower has priority over a mechanic's lien. 537.

EASEMENT—

In a vacated street remains in the grantee whose grantor described the property by the line of the street. 504.

ELECTIONS—

A candidate receiving the lowest vote for county commissioner at the election of 1920 may contest the election of the other two for the purpose of determining which shall have the long term. 250.

EMPLOYMENT—

In case of recovery for breach of a contract of employment, the measure of damages would be the difference between what the defendant had contracted to pay and the amount plaintiff would have earned had he exercised reasonable diligence in seeking other employment. 450.

Action by employee for breach of contract of employment where the services were to be to the entire satisfaction of the employer; burden on the employee to show that his discharge was for some reason other than this dissatisfaction with his services. 450.

ERROR—

May be prosecuted to an order of dismissal made subsequent to the overruling of a demurrer to which no exception was taken. 489.

Leave must be obtained from the common pleas court to the prosecution of error to the municipal court in a criminal case. 500.

ESTATES OF DECEDENTS—

No trust created by a promise made by a decedent to make a gift of a certain bank deposit. 381.

Bar of the statute against an obligation of a decedent where no action was instituted until the eighteen months period had elapsed. 381.

ESTOPPEL—

The fact that an unequal division was made by a corporation of profits can not be set up as a defense to the treatment of the division as a dividend. 81.

EVICTIION—

Holding under a lease of bind-

ing force entitles the lessee to damages in an amount equaling his rents and profits for the remainder of the term. 579.

EVIDENCE—

A reviewing court will not set aside a judgment in a criminal case because of a mere conflict in the testimony. 273.

It is within the discretion of a trial judge whether the testimony shall be received of a witness who has remained in the court room contrary to an order for the separation of witnesses. 273.

Competency of declarations made by a donor in his lifetime. 313.

Declarations made by a deceased donor of land are competent when offered by the donee in defense of his title; contrary statements by the donor will be treated as self-serving and are inadmissible. 313.

A conviction by a trial court can not be reversed for error because against the weight of the evidence, unless it be found to be manifestly so. 166.

A notary taking depositions can commit for contempt only in case of refusal to furnish proper evidence; a plaintiff can not be committed for refusal to disclose the source of information upon which he bases his suit. 19.

EXCAVATIONS—

Where a contractor for an excavation agrees with the owner of the property to protect the adjoining lot by shoring it up, the agreement is enforceable by the owner of the adjoining lot. 465.

EXCEPTIONS—

Where taken during the trial of a cause apply to decisions made during the trial or to judgment entries embodying such decisions and have no reference to rulings on demurrer; decisions, orders and judgments distinguished. 489.

Failure to note an exception to the overruling of a demurrer,

when no final order is made at the time, does not prevent the defeated plaintiff from prosecuting error to a final order of dismissal subsequently made. 489.

EXECUTOR—

Not liable for assets distributed by him at a family meeting and in accordance with the terms of a will which was afterward set aside. 544.

EXTRADITION—

One brought into the state by extradition is not subject to civil process. 309.

FINAL ORDER—

The closing of a case by the industrial commission constitutes a final order. 241.

FISH AND GAME—

Charges of violation of the fishing laws sufficiently locate the place of the offense, when; possession of forbidden fishing devices within a short distance of a public stream renders the possessor as liable to prosecution as though he was actually using the devices. 569.

Net and line prohibition; locating of offenses within the Inland Fishing District. 569.

FRATERNAL ORDERS—

Masonic Grand Lodge and the Colored Masonic National Grand Lodge enjoined from interfering with each other; both entitled to the appellation "Free and Accepted Masons." 445.

GAME LAWS—

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GARAGE—

Violation of an ordinance governing the location and operation of public garages may be enjoined by an abutting property owner. 235.

GIFTS—

Validity of oral agreement for conveyance of land; statute of

frauds not applicable to such agreements, when; competency of declarations made by the donor in her lifetime; laches. 331.

GUARDIAN AND WARD—

A conveyance of property made secretly by an aged man under guardianship is void and may be set aside and the title quieted in him. 303.

HUSBAND AND WIFE—

Marital rights of a husband as against provision in an agreement between his deceased wife and her father relative to certain securities. 425.

A mortgage executed by a wife on her separate property without consideration may be avoided by her, where her signature was procured by threats that if she did not sign her husband would be sent to the penitentiary for contracting a fraudulent debt. 467.

The lien for an improvement placed upon property belonging to a husband under a contract to which the wife was not a party is subordinate to the wife's inchoate dower right. 537.

INFANTS—

Rights of an injured boy, not yet sixteen years of age, under the compensation law. 593.

INJUNCTION—

Lies upon petition of an abutting property owner against operation of a public garage in violation of a municipal ordinance. 235.

INSURANCE—

Bonds deposited by foreign companies for protection of Ohio policy holders are not taxable in Ohio. 329.

INSURANCE, LIFE—

Notice to the solicitor of life insurance that the policy delivered was more expensive and failed to incorporate provisions contracted for; was the contract thereby re-

scinded where there was some delay in giving the notice. 473.

INTERSTATE COMMERCE—

Not an interference with, to require a steamboat to comply with a municipal smoke abatement ordinance. 1.

INTOXICATING LIQUORS—

Prosecutions may proceed before justices of the peace of Scioto county outside of the city of Portsmouth. 533.

John Doe search warrants can not be used for discovery and seizure of liquor unlawfully possessed; no discretion in officer serving such a warrant. 589.

An ordinance prohibiting the manufacture or sale of intoxicating liquors for beverage purposes is a valid enactment. 166.

Prosecution for selling and keeping a place where intoxicating liquors are sold "in violation of law;" sufficiency of affidavit; prosecution for a second offense can not be maintained where conviction for a first offense is pending on appeal; abatement of place as a nuisance does not entitle defendant to a jury trial. 273.

A prosecution for keeping a place where intoxicating liquors are sold, furnished or given away is not authorized by the Crabbe act, but falls under an old law. Section 13195. 393.

Final jurisdiction in liquor cases under the Miller act; jurisdiction in liquor cases of the mayor of a village situated in two counties. 393.

Prosecutions for the manufacture, sale, having in possession or giving away of intoxicating liquors fall under the Crabbe act; failure in affidavits under which arrests are made to negative the exceptions authorized by the Crabbe act does not render such arrests illegal. 393.

Complaint does not lie because of denial of trial by jury in liquor cases where imprisonment is not a part of the penalty. 393.

JOINDER—

The cancellation of a release for injury or wrongful death and an action for damages on account of the injury or death may be joined. 140.

Of tort feasons as defendants; a case may proceed although not all the defendants have been served, when. 489.

JUDGES—

Construction of the constitutional provision that judicial salaries shall not be "increased" during the term of office of an incumbent. 485.

Of courts of general authority are invested with immunity from private suits directed against them individually because of judicial acts performed and this is true regardless of the motives prompting the performance of such acts. 558.

A petition directed against judges, jurors and others, based on a prosecution, may be stricken from the files under the inherent power of the court. 558.

A mayor, justice of the peace, municipal, police, probate or common pleas judge has final jurisdiction within the county of all misdemeanors arising thereon to intoxicating liquors or providing for the enforcement of laws relating to intoxicating liquors. 393.

JUDGMENTS—

Void judgments distinguished from those which at most are only erroneous. 558.

JUDICIAL NOTICE—

May be taken of changed conditions. 257.

JURISDICTION—

The jurisdiction of the mayor of a village situated in two counties is co-extensive with both counties; maintenance of an office in each county not necessary. 393.

State courts have no jurisdiction over subjects which come primarily within the jurisdiction of

the Interstate Commerce Commission. 457.

Jurisdiction in matters of railway demurrage. 457.

Justices of the peace in Franklin county outside of the city of Columbus without jurisdiction within said city in criminal cases. 477.

Of an Ohio municipality below low water mark on the Ohio river; Steamboat lying below low water mark at a municipal wharf in the Ohio river is subject to the municipal smoke abatement ordinance. 1.

Where the probate court has consented to a settlement for wrongful death, it is without authority to withdraw such consent. 140.

LACHES—

A party in possession can not be charged with laches in asserting title where permanent improvements have been made upon the land and the taxes and assessments paid. 313.

LANDLORD AND TENANT—

The possession of a lessee being the possession of the landlord his rights are not affected by a change of landlords. 105.

Where a lease is found to be defective in form but perfect in fact, and it is evident that the parties intended to execute a lease, it is of binding force, not as a contract for a lease but as a lease. 579.

Eviction of one conducting a going business under such a lease renders the lessor liable for the earnings and profits during the remainder of the term; good will of too speculative a value to be considered as a basis for damages. 579.

LEASE—

A defectively executed lease covering real estate subsequently transferred to a third party with notice of the purported lease and its defective character, may be en-

forced against the transferee by the prior intended lessee. 527.

The recording act is without application to a defectively executed lease. 527.

A lease for one year with privilege of three years more is not a lease for four years and therefore invalid unless written, acknowledged and recorded. 209.

Leases with covenants to renew distinguished from those with covenants to extend. 209.

LICENSE—

For transporting garbage through the streets; ordinance declared invalid because the amount fixed was unreasonable. 549.

Validity of an ordinance requiring that soft drink places be licensed. 267.

LIENS—

See MORTGAGE.

LIENS, MECHANICS—

The waiver of a lien is not rendered without effect because procured without consideration by a building association for the owner of the property as well as in its own behalf; applicable to subsequent claims as well as those already accrued. 481.

Where a mechanic improves property under a contract to which the wife of the owner was not a party and has given no release, the inchoate dower right is paramount to the lien thus created. 537.

LIFE ESTATE—

An owner for life of an undivided interest in real estate may compel partition, but the decree will be limited to partition of the life estate and can not extend to the entire fee simple title unless one or more of the owners of the fee join in a prayer for partition of the fee. 521.

LIMITATION OF ACTIONS—

Application of provision that claims against an intestate shall be presented within eighteen months. 381.

MASTER AND SERVANT—

See EMPLOYMENT.

Defense of fraud and misrepresentation available to an employer in the case of an injured boy who proves to be under age. 593.

MECHANIC'S LIENS—

See LIENS, MECHANIC'S.

MERCHANT—

Not negligent in selling an article in common use, and not recognized by the trade as dangerous, without warning to the customer when. 448.

MINOR—

Right of to compensation under the workmen's compensation law where partial dependency only can be shown. 171.

MORTGAGE—

A vendor does not loose his lien by accepting a mortgage containing false covenants, but may rely on express covenants. 361.

A mortgage given to secure a note, executed to suppress a criminal prosecution, is not enforceable. 69.

Determination as to the standing of liens which attached subsequent to the cancellation by mistake of a mortgage on the same property. 225.

Priority of a mortgage cancelled by mistake as distinguished from that of an unrecorded mortgage. 225.

A mortgage executed by a married woman on her separate property without consideration is not enforceable where induced by hope of thereby saving her husband from prosecution. 467.

MOTOR VEHICLES—

Passenger injured through negligence of chauffeur. 553.

MUNICIPAL CORPORATIONS—

Bids for bonds offered by a municipality; terms and conditions of the sale and purchase are found in the offer of the purchaser as accepted by the seller,

rather than as expressed in the advertisement for bids; "legality" of the issue includes the security offered as well as compliance with legal formalities; disposition of check deposited as liquidated damages in case of breach on the part of the bidder. 145.

A municipality may make the manufacture and sale of intoxicating liquor for beverage purposes unlawful. 166.

Construction of ordinance providing for reduced street car fare for school children between ten and eighteen years of age; pupils in Catholic schools of different names held to be included. 585.

A city ordinance which exacts a license fee of twenty dollars a month upon the business of collecting and transporting garbage through the streets, is not a regulatory measure, and is invalid because of its unreasonableness. 544.

Authority of home rule cities to fix reasonable fees to be paid by persons in different occupations. 549.

A building ordinance, restricting in one certain locality or zone the erection of buildings to single and double residence dwellings only, is within the police power of a charter city, in the absence of any unreasonable, arbitrary or discriminatory classification. 549.

Validity of ordinance requiring soft drink places to be licensed; innocent enterprises with offensive adjuncts. 267.

Quasi-judicial duties and administrative functions may be imposed on administrative officers, when. 267.

A municipality may by ordinance and under the police power prohibit begging. 372.

A municipality is without authority to restrict, by ordinance, the employment of guards during the industrial disturbances as was done in the case under consideration. 65.

NATIONAL PIKE—

Eighty feet the width of as originally fixed; abutting owner's title extends to the middle of the road; encroachment on the roadway does not give rights against the public by adverse possession. 118.

A change in the location of telegraph poles along this highway can not be made without compensation to the abutting owners, where a new burden is thereby imposed. 118.

NEGLIGENCE—

In approaching a railway crossing where the view is obstructed, the stopping and looking must be done at a point where a view of the tracks can be obtained. 255.

Of a city contractor; covenant entered into with him not to sue is available to the city. 222.

A retail merchant can not be held in damages for injuries received by a purchaser of an article in common use and not recognized by the trade as dangerous. 448.

Question of in the rescission of a contract alleged to have been induced by false representations. 473.

The negligence of the agent of a corporation is the negligence of the corporation. 422.

Actions between the same parties in different counties growing out of the same automobile accident; the statutory phrase "injured person" includes injuries to both person and property. 419.

Of the driver of an automobile can not be imputed to an injured passenger, when. 553.

NEGOTIABLE INSTRUMENTS—

Notes and mortgage made to a fictitious person to avoid taxation are not in effect payable to bearer and are unenforcible. when. 405.

NOTARY—

In taking depositions can commit for contempt only where refusal is made to answer proper

questions or to produce papers competent as evidence. 19.

NOTICE—

To the solicitor of life insurance that the policy delivered was not what was contracted for and the note given for the first premium would not be paid. 473.

NUISANCE—

To hold officers and employees of a corporation criminally liable for a nuisance created in the conduct of the corporate business, it must be made to appear that the nuisance was created in the careful conduct of the business in the customary way, or that an officer or agent knowing of the nuisance and having power to abate it permitted it to continue. 1

Ordinance imposing a duty with reference to individuals rather than the whole public; violation of an ordinance governing the location and operation of public garages may be enjoined by an abutting property owner. 235.

OFFICE AND OFFICER—

Civil service commission without authority to delegate appointment to a position in the classified service where exceptional qualifications of a scientific, managerial, professional or educational character are required. 345.

OHIO RIVER—

Jurisdiction of an Ohio municipality over a steamboat lying at its wharf but below the low water line. 1.

PARENT AND CHILD—

Section 1649 requires that parents provide their children with a proper education, which the court construes to mean an education substantially equivalent to that furnished by the public schools. 129.

Where a child is excluded from school because of the father's refusal to permit him to be vaccinated, the father is not liable to

prosecution under the compulsory act for the non-attendance of his child at school, but the child may be declared "dependent," and any person causing or contributing to dependency is liable to prosecution therefor. 129.

PARTITION—

Duration of the estate is not a test as to the right to partition, but may determine the character of partition to be decreed. 521.

One holding an interest in the title to property may compel partition notwithstanding the property is under a perpetual lease. 105.

PARTNERSHIP—

Two brothers operating together their father's farm constitute a partnership. 519.

PERSONAL INJURIES—

An allegation that the plaintiff was injured as a result of a "willful act" of his employer will not be stricken from the petition but will be left for plaintiff to establish when the case comes on for hearing on the merits. 505.

A violation of any of the provisions of Section 1027 is a violation of a "lawful requirement" within the meaning of Section 1465-76. 505.

Election of an injured employee to sue his employer directly. 505.

PICKETING—

Malicious interference with the right to carry on business in the manner the owners may deem advisable is an interference with the constitutional right to liberty and property and may be enjoined. 171.

PLEADING—

In an action for divorce and alimony wherein the plaintiff has not been a resident of the county during the thirty days immediately preceding the filing of the petition. 483.

A demurrer applies to the petition as it stands without presumption as to outside facts. 209.

In an action where an injured workman elected to sue his employer directly. 505.

Inherent power of the court to strike a sham pleading from the files. 558.

POLICE POWER—

The police power of a state includes all those regulations which tend toward the betterment of society, the preservation of property, and the happiness, health, comfort, safety and welfare of mankind. 372.

A municipal ordinance prohibiting begging is a proper exercise of the police power. 372.

A charter city may under its police power establish zones within which buildings of a certain class or classes only may be erected. 549.

Right of a municipality to classify street obstructions and prohibit temporary obstructions. 1.
PRESCRIPTION—

A right of way for use as a street may be acquired by adverse possession; actual possession by claimant sufficient notice to purchaser. 49.

PROMISSORY NOTES—

See **BILLS, NOTES AND CHECKS.**

A note and mortgage, given to suppress a criminal prosecution, are both void. 69.

The vendor of a promissory note by delivery for value after due warrants that it is founded on a valid consideration, notwithstanding endorsement "without recourse on me," and this endorsement extends to a remote transferee; a subsequent holder may maintain an action against the original payee who endorsed the note as an action for damages for breach of the warranty; payee estopped from setting up a claim of want of knowledge of invalidity of the consideration. 69.

Purchase of a promissory note after it has become due does not of itself raise a presumption against the purchaser that he

knew of the invalidity of the consideration. 69.

Circumstances under which it was a question for the jury to determine whether or not there was unreasonable delay in rescinding the contract upon which the note in suit was based. 473.

If a promissory note is void for illegality of consideration, the endorser is liable without notice of dishonor and demand on the maker for payment. 69.

PROPERTY RIGHTS—

Courts of equity will interfere to protect property rights from unlawful interference under a void law. 267.

RAILWAYS—

In determining whether a municipality may appropriate a right of way for a grade crossing, the future requirements of the railway as well as of the public must be considered; public convenience as distinguished from public necessity in the matter of such crossings. 161.

Jurisdiction in matters of railway demurrage; bunching of cars by reason of intense cold and heavy snow not an act of God; binding effect of Interstate Commerce rulings. 457.

RECORDING ACT—

Does not apply to a defectively executed lease. 527.

RELEASE—

The setting aside of a release is a prerequisite to an action for damages; but the cancellation of a release and an action for damages are joinable. 140.

RELIGIOUS SOCIETIES—

A conveyance by a religious society without authority of court is open to attack by a member of the society only; it is at most voidable and is open to attack only by those who had a right to object at the time and upon grounds which would probably have been suffi-

cient to have caused the order to have been denied in the first instance. 49.

A bequest to a church is subject to the inheritance tax unless it is to be used for purposes of public charity only. 574.

RESTAURANT—

Sale of chattels and good will of a restaurant under an agreement that the vendor will not enter into competition within one square for the period of one year. 377.

RIGHT OF WAY—

The title and right of possession of a right of way may be acquired by adverse possession; actual possession is notice to a prospective purchaser of a claim to an equitable title; grant limited to that specifically described in deed although a more extended right was attached as an appurtenance. 49.

ROADS—

See NATIONAL ROAD.

The right of an abutting owner to use the roadway, subject to the rights of the public, is a property right and can not be materially abridged for uses other than those of public travel without compensation to the land owner even though the injury may be slight. 118.

Improvement of with state aid; liability of townships to county for share of cost; apportionment among abutting property owners. 26.

Procedure of county commissioners and township trustees with reference to improvement of a highway. 26.

SALES—

Of articles in common use without warning to the customers of possible danger in such use. 448.

Of a business with an agreement attached not to enter into competition within a specified zone for a stated period. 377.

Of machinery on approval; when

title passes; rescission must be tendered or no basis is afforded for action thereon. 297.

SCANDALOUS PUBLICATION—

An affidavit charging the sale of a scandalous publication must state what therein contained is indecent or likely to create a breach of the peace. 399.

SCHOOLS—

Boards of education may exclude children from the public schools for non-compliance with existing rules and regulations relating to vaccination. 129.

Character of the offense of a parent who refuses to permit his child to be vaccinated, and in consequence the child is excluded from school and deprived of school advantages. 129.

The words "public" and "parochial" schools where used in a city ordinance include Catholic academies, Catholic high schools and convent schools. 585.

Ordinance providing for reduced street car fare for school pupils between ten and eighteen years of age. 589.

In making contracts for the convenience of the public schools, boards of education are limited only by the provisions of Section 7623 as to public competition. 409.

A contract for cleaning and performance of janitor service in public school buildings may be entered into by a board of education without advertisement for bids. 409.

A contract for such service entered into by a board of education having a large number of buildings under its control; board may award the work to a single contractor, notwithstanding the specifications require that the contractor for each school building must be in attendance from 7 a. m., until 6 p. m. 409.

SEARCH WARRANT—

Must specify with exactness the persons and property covered; Joe Doe warrants not available in

cases of violation of liquor laws; no authority or discretion vested in officer serving the warrant beyond that specifically stated. 289.

SMOKE ABATEMENT—

The Cincinnati smoke abatement ordinance comes within the police power of the state, and application of its provisions to a steamboat lying at a municipal wharf below the low water line is not an interference with interstate commerce and does not conflict with the act of Congress regulating steam vessels. 1.

STATUTE OF FRAUDS—

Satisfied in the matter of a defectively executed lease, when. 527.

An oral agreement for conveyance of land is taken out of the statute of frauds and is enforceable in Ohio where there has been a part performance; possession, even without making improvements, is such part performance, the only requirement being that what has been done shall be referable to some contract relating to the specific land. 313.

STATUTES CONSIDERED—

Section 4551, relating to appeal and error. 500.

Section 13751, relating to the review of judgments and final orders in criminal cases. 500.

Section 1027, embodying provisions to prevent injury to persons who use or come in contact with machinery. 505.

Section 1465-93, of the workmen's compensation law. 593.

Section 7623, relating to the method of making certain contracts. 409.

Section 6308, relating to jurisdictions for injury to person or property. 419.

Section 1649, requiring parents to provide their children with a proper education. 129.

Section 10051, providing how a religious society may sell or encumber real estate. 49.

Section 5437, exempting from local taxation bonds deposited by foreign insurance companies with the Superintendent of Insurance. 329.

Section 8399, providing how intention of parties shall be ascertained where goods are sold on approval. 297.

STEEL WOOL—

Sale of by retail merchant for domestic use without warning to the customer, not negligence when. 448. .

STREETS—

Rights of abutting owners not invaded by use of the space between the sidewalk and curb for poles and wires the primary use of which is for street lighting purposes. 55.

STRIKES—

An ordinance forbidding the employment of guards during industrial disturbances is in violation of rights which are fundamental and inalienable. 65.

SUBROGATION—

Where in an action for damages the defense was set up that payment had been made by an insurance company of all loss sustained. 206.

SUMMONS—

In actions against corporations; service on a sales agent not effective; upon whom service may be had. 486.

A non-resident charged with crime and brought into the jurisdiction by compulsor process is exempt from service in a civil action, regardless of good faith in bringing him within the jurisdiction. 309.

TAXATION—

The protection accorded by the state and local government to personal property belonging to a non-resident decedent renders it subject to the Ohio inheritance tax; items of personalty liable for said tax. 33.

A bequest to a church to be used

for purposes of public charity only is not subject to the inheritance tax; a bequest to a church building fund does not fall within the exceptions to this tax. 574.

A bequest to a church building fund, based on a contract entered into with the church officers prior to adoption of the inheritance tax law, is not subject to the inheritance tax. 574.

Where notes and mortgage are made payable to a fictitious person for the purpose of avoiding taxation they are unenforcible, when. 405.

The duty to pay taxes lawfully imposed is a public duty owing to the sovereign, a violation of which is identical with a breach of any other law prescribing rules of conduct, and a penalty of arrest or fine for failure to pay such a tax is not in violation of the constitutional provision against imprisonment for debt. 113.

Situs of bonds where deposited in Ohio by foreign insurance companies for protection of resident policy holders; Section 5437 exempting such bonds from taxation is a constitutional enactment. 329.

The statutory phrase "legal bona fide debts," as applied to a tax return, is not used in the narrow, technical sense; all debts legally owing are deductible from credits. 353.

In deducting from credits his debts and obligations then existing, a property owner in making his tax return is entitled to include all debts whether based on a consideration actually received or not. 353.

TELEGRAPH—

The appropriation of a portion of a public highway for the purposes of a telegraph line is a new use and an additional burden upon abutting land owner's interest in the roadway. 118.

Where telegraph poles have occupied a certain position in the roadway for many years, their location can not be changed in such a way as to impose an ad-

ditional burden upon an abutting owner without compensation being made to him. 118.

The fact that the state has ordered the telegraph company to move its poles so that the highway can be improved does not relieve the company from the obligation of compensating the land owner for any increased burden which may be thus imposed. 118.

TITLE—

Acquired by devise and not by purchase although the devisee was charged with payment of a bequest. 213.

When title passes where a machine has been sold on approval. 297.

A secret conveyance by an aged man under guardianship may be set aside and title to the property quieted in him. 303.

To land claimed as a gift; oral agreement to make the gift taken out of the statute of frauds by part performance; making of improvements and payment of taxes such part performance; claim that title was not asserted seasonably does not lie where there has been such part performance. 313.

When a grantee or mortgagee protects himself by express covenants, he is not required to go further, even though the means for informing himself as to the title are at hand. 361.

TORTS—

Unfair competition is a tort; joinder of tortfeasors in an action to restrain unfair competition; case may proceed against those within the jurisdiction, when. 469.

TRADE DISPUTES—

Malicious interference with the carrying on of business in the manner its owners deem advisable is a violation of their constitutional rights and may be enjoined. 171.

Trade disputes which constitute a justification for interference with the business of another without regard to the existence of an intent to injure; the "bannering"

of a place as "unfair" is not justified, when. 171.

Illegal conspiracies which may be enjoined. 177.

TRADE-MARKS—

Used in a secondary sense of a word incapable of becoming valid. 469.

TRUSTS—

Scope of the trust created by an agreement between father and daughter affecting the ownership of securities; such a trust not executory in character; adequacy of consideration; bearing of previous adjudication; not testamentary in character; subsequent will of daughter not effective against provisions of the trust; marital rights of husband of the daughter. 425.

The will of a daughter is not effective against the provisions of a trust previously consented to by her. 425.

A trust agreement is not testamentary in character when. 425.

Statements by a decedent as to a proposed gift of a certain bank deposit, in consideration of love and affection and in payment for services rendered is not sufficient to establish a trust in said fund. 381.

A trust is impressed upon the proceeds of government insurance where the deceased soldier in making his father his beneficiary added the request that part of the proceeds be paid to a third person to which the father assented. 601.

Unfair competition is a tort. 469.

The fact that two of the defendants, in an action to enjoin unfair competition, are beyond the jurisdiction of the court will not prevent a court of chancery from granting relief against those within its jurisdiction, provided it can be done without depriving those not before the court of substantial rights. 469.

What constitutes unfair competition; when a necessity exists to permit an action to proceed against defendants within the jur-

isdiction; use of a trade name in a secondary sense will be enjoined, when. 469.

It is without avail for one charged with unfair competition to deny an intent to injure. 460.

Proprietors of "The Big Store" granted an injunction against use within the same trade zone of the name "Covington's Big Store." 469.

VACATION—

Of street; division of the land where the contributions of abutting owners were unequal; title remains in the grantee of a grantor who described the property as running to the line of the street. 504.

VACCINATION—

Boards of Education may require that children attending the public schools shall be vaccinated, and failure to submit to vaccination may be made ground for exclusion from school. 129.

VENDOR AND PURCHASER—

A vendor does not waive his lien as to the purchaser by accepting a mortgage afterward found to obtain false covenants; where the vendee has protected himself by express covenants he may rely upon them notwithstanding opportunity to ascertain the truth as to the title. 361.

A contract for the sale of a restaurant, with its chattels and good will, is not rendered invalid by reason of a stipulation that the vendor will not enter into business in competition with the purchaser within one square of the location sold and for a period of one year. 377.

Becoming manager of a competing restaurant within the prescribed zone held to be in violation of such a covenant. 377.

Rights of one who purchases a business to which the vendor attaches a stipulation not to compete. 377.

VENUE—

In actions against a corporation the venue is the place where the corporation is situated or its principal office or place of business is found or any of the officers named in the statute may be summoned; in actions (not against railroads) service must be had upon some officer who has and exercises corporate power or has authority to act for the corporation. 486.

VERIFICATION—

Of a petition for divorce does not preclude plaintiff from introducing evidence to the effect that she was a resident of the county during the thirty days immediately preceding the filing of the petition. 483.

WAIVER—

Waiver of the right of a mechanic's lien by those who have furnished material or labor for a building not open to attack because procured by a building association for the benefit of the owner of the property as well as in its own behalf; applicable to subsequent claims as well as those already accrued; consideration not necessary. 481.

WARRANTS—

Of arrest under the Crabbe act not rendered invalid by reason of failure to negative exceptions authorized under said act. 393.

WARRANTY—

Where a title is warranted as "clear, free and unincumbered," recovery may be had of the amount of an assessment outstanding on land purchased by the plaintiff from a grantee of the defendant and which plaintiff was required to and did pay. 189.

WILLS—

Adoption by reference to letter of instructions not in existence at the time of execution of the will, not effective. 158.

Where a document is to become part of the will, it must correspond to the description of it contained in the will and must be shown to be the instrument so referred to. 158.

Estates will not be cut down because of doubts or inferences; title quieted against the contingency of an executory devise. 513.

The words "should my daughter M die without issue her surviving," held to be dependent upon her death occurring before she arrived at the age of twenty years, the point of distribution provided for in the will. 513.

Determination of the period of distribution under a will. 513.

An executor will not be held liable for assets distributed at a family meeting and in accordance with the will which was afterward set aside, notwithstanding the distribution was made without an order of the probate court; but where the executor was not an heir-at-law he will stand charged with the legacy he paid to himself and with interest thereon, and he will also be required to pay a personal note held by the estate which was surrendered to him at the family meeting. 544.

A devise to A for life and then to B, but with the provision that if B should die without issue the property should revert to the next of kin of the testatrix, the words "in case of death without issue" refer to the death of B during the lifetime of A. 60.

WORDS AND PHRASES—

Meaning of the word "legality" as applied to an issue of municipal bonds. 145.

Application of the words "willful act" and "lawful requirement." 505.

The words "public" and "parochial" held to cover academies, convent and high schools under Catholic direction. 585.

Construction of the words "in case of death without issue" as used in a will. 60.

WORKMEN'S COMPENSATION—

Disease developed by a factory employee from a defective appliance (breathing acetylene gas) is not due to a natural or ordinary cause and does not fall within the category of occupational diseases; such an employee is entitled to compensation. 41.

Appeal lies from a denial by the industrial commission of compensation for injuries on the ground that the earning capacity of the claimant is no longer impaired. 43.

Right of appeal from an award which is equivalent to a rejection; closing a case by the commission constitutes a "final order;" commission without authority to pay for a surgical operation to relieve trouble due to a natural cause. 247.

Construction of the phrase "five or more" employees. 519.

An injured employee waives right of action against his employer by collecting from the state insurance fund; construction of amended Section 1465-93 of the compensation act. 593.

Slight variance in the performance of a single duty is not a bar to recovery for accidental death. 153.

Recovery on account of the death of an employee not barred by reason of the fact that in going to call upon a customer he rode as a guest in an automobile instead of using the horse and delivery wagon provided for him. 153.

Delinquent father killed during the course of his employment; dependency of minor children who were receiving no support from him; partial dependency established. 171.

Heat stroke an injury for which compensation can be claimed; use of intoxicating liquor by dece-

dent; separation from family at intervals not a bar to compensation. 171.

Right of appeal from an award which is equivalent to a rejection; closing a case by the commission constitutes a "final order;" commission without auth-

ority to pay for a surgical operation to relieve trouble due to a natural cause. 241.

Where settlement has been made with the consent of the probate court, that court is without authority to withdraw said consent. 140.

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